TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 316. 127.

THE UNITED STATES, APPELLANT,

vs.

BYRON BARLOW, JAMES E. BLACKWELL, AND JAMES M. DOUGAN, PARTNERS AS BYRON BARLOW & CO.

No. 376. 128

BYRON BARLOW, JAMES E. BLACKWELL, AND JAMES M. DOUGAN, PARTNERS AS BYRON BARLOW & CO., APPELLANTS,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED AUGUST 4, 1900.
(17861 and 17862.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 376.

THE UNITED STATES, APPELLANT,

vs.

BYRON BARLOW, JAMES E. BLACKWELL, AND JAMES M. DOUGAN, PARTNERS AS BYRON, BARLOW & CO.

No. 377.

BYRON BARLOW, JAMES E. BLACKWELL, AND JAMES M. DOUGAN, PARTNERS AS BYRON, BARLOW & CO., APPELLANTS,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

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1 I. *Communication from the Secretary of the Treasury referring claim.*—Filed February 20, 1896.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., February 19, 1896.

The Honorable the Chief Justice and Judges of the Court of Claims:

Pursuant to the provisions of section 2 of the act of March 3, 1883 (22 Stat., 485—the Bowman Act), and as requested by the Comptroller of the Treasury in his letter of the 15th instant, I have the honor to transmit herewith the claim of Byron Barlow & Co. for extra work in connection with the dry dock at Puget Sound Naval Station, amounting to $1,156.76, which was disallowed by the Auditor for the Navy Department on January 12, 1895, and transmitted to the Comptroller of the Treasury, at the request of the Secretary of the Navy, for a revision of the Auditor's settlement, as provided by section 8 of the act of July 31, 1894 (28 Stat., 207).

The Comptroller says, "the principal questions at issue in the case are whether the Secretary had authority by oral direction to vary the terms of a written contract wherein was provided a formal method for varying such contract, and whether, under the action taken by the Secretary, any claim arose in favor of claimants for extra compensation," and that "the claim involves controverted questions of fact and law."

All vouchers, papers, proofs, and documents pertaining to the claim are herewith transmitted, together with a list of said documents.

Respectfully, yours,

S. WIKE,
Acting Secretary.

2 In the Court of Claims, December term, 1896.

BYRON BARLOW, JAMES E. BLACKWELL, and James M. Dougan, partners doing business under the firm name and style of Byron Barlow & Co., v. THE UNITED STATES.	Department case No. 50.

II. *Petition.*—Filed January 9, 1897.

To the Honorable the Court of Claims:

The claimants, Byron Barlow, James E. Blackwell, and James M. Dougan, respectfully represent:

The claimants, Byron Barlow, James E. Blackwell, and James M. Dougan, as co-partners in business under the firm name and style of Byron Barlow & Company, all of the city of Tacoma, in the State of Washington, did on the 29th day of October, in the year 1892, enter into a contract with the United States as the accepted bidders under advertisement for the construction of a dry dock at the United States naval station on Puget Sound, in the State of Washington, for particulars of which contract reference is made to the contract itself, a copy of

which is embraced in the papers transmitted to this court by the Secretary of the Treasury in this cause, and certain material provisions of which contract are as follows:

"Seventh. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed, and shall be deemed and taken as
3 forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractors, and all claims for extra compensation by reason of, or for or on account of, such extra performance, are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect, except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change or modification in the aforesaid plans and specifications, such change or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof which the contractors shall receive, if any: Provided, That whenever the said changes increase or decrease the cost by a sum exceeding five hundred dollars ($500), the actual cost thereof shall be determined by a board of naval officers appointed for the purpose, and the contractors shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation they shall be entitled to receive in consequence of such change or changes: And provided also, That no further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part: And provided further, That no change herein provided for shall in any manner affect the validity of this contract."

* * * * * * *

"Fourteenth. It is expressly understood, covenanted, and agreed, by and between the parties to this contract, that if any doubts or
4 disputes arise as to the meaning or requirements of anything in this contract, or if any discrepancy appear between the aforesaid plans and specifications and this contract, the matter shall be at once referred for the consideration and decision of the Chief of the Bureau of Yards and Docks, and his decision thereon shall be final, subject, however, to the right of the contractors to appeal from such decision to the Secretary of the Navy, who, in case of such appeal, shall be furnished by the contractors with a full and complete statement of the grounds of their appeal, in writing, and shall thereupon take such action in the premises as, in his judgment, the rights and interests of the

respective parties to this contract shall require, and the parties of the first part hereby bind themselves and their heirs and assigns, and their personal and legal representatives, to abide by his, the said Secretary's, decision in the premises."

Said contract was accompanied by plans and specifications, certain of the provisions of which specifications, material to the present case, were as follows:

"The contractor shall furnish all necessary facilities, should it be deemed advisable by the engineer to make an examination of any work already completed. If the work is found defective in any respect, he shall defray all expenses of such examination and of satisfactory reconstruction. If the work is found perfect, such expenses will be allowed for."

"All piles in the bottom of the dock shall be accurately spaced and driven vertically until a satisfactory depth has been reached and the penetration is not more than one-quarter (¼) inch under the last blow of a hammer weighing three thousand (3,000) pounds falling twenty-five (25) feet, or the equivalent thereof, unless the Bureau shall authorize a modification hereof after examination and tests are made."

The claimants thereupon proceeded with the execution of said contract in strict accordance with the terms thereof, and, among other things, drove all piles in the bottom of the dock until a depth had been reached at which the penetration was not more than one-quarter (¼) of an inch under the last blow of a hammer weighing three thousand (3,000) pounds falling twenty-five (25) feet, and until more than half of such piling had been completed to the satisfaction of the engineer in charge and under the direct personal orders of the inspectors acting under the direction of such engineer, and until such inspectors were personally satisfied as to each and every pile so driven.

On or about the 16th day of February, in the year 1894, the claimants were notified by the engineer in charge of a direction of the Navy Department requiring that said piles should be put in by water jet, and further notifying them to provide the necessary plant for that method of putting in the piles. Whereupon the claimants called the attention of said engineer to the paragraph of the specification hereinbefore cited providing for the driving of such piles by means of a hammer, specifying the weight and drop of the same, and the fact that they had provided hammer pile drivers amply sufficient in all respects for driving all the piles, and that such piles were being driven in strict accordance with the terms of the specifications to the satisfaction of the inspectors on the work and of said engineer himself, and demanded that if it was decided on the part of the United States to make so radical a change in the mode of driving the piles, it should be done by the appointment of a naval board, as provided in paragraph 7 of the contract, and at the cost of the United States, and further stated that in the opinion of the claimants an attempt to jetty the piles into the sandy foundations underlying said dry dock would disintegrate and destroy the bottom, and insisted that the Government should assume all responsibility for the damage that might be thereby caused. Thereupon, and in consideration of the objections so raised by the claimants, they were allowed to proceed with the driving

of piles by the hammer as before, and their work in so doing was
6 passed and approved by the inspector on the work and by the engineer in charge and regularly paid for on duly certified vouchers until the 13th day of April, 1894, when, by telegraphic dispatch received from the Navy Department, work on such pile driving was temporarily suspended and continued to be so suspended until the Secretary of the Navy, Hon. Hilary A. Herbert, in the month of May, 1894, personally visited the site of the work for the purpose of inspecting the driving of piles by the hammer, and personally directed, on or about the 21st day of May, in the year 1894, that as an experiment the contractors should provide a plant for using the water jet, which they did, and proceeded to drive said piles by the use of said water jet until about the 8th day of June, 1894, when, as the apprehensions previously expressed by the claimants in regard to disintegrating the foundations of said dry dock by the use of said water jet appeared to be verified, the same was suspended by direction from the civil engineer of the United States Navy in charge of the work until a direction could be obtained by telegraph from the Secretary of the Navy, which direction was on the 9th day of June, 1894, given by said Secretary by telegraph to the commanding officer at the Puget Sound Naval Station, as follows:

"Use jet with least amount of water to get piles down, and hammer to set them firm."

Whereupon the use of said water jet was resumed in the manner required by said telegram, but with such unsatisfactory results that the commanding officer at said Puget Sound Naval Station thus advised the Department by telegram dated June 12, 1894:

"Obeying Department telegram of 9th inst., resumed driving piles with water jet. Engineer reports results worse than first trial. Piles
7 can not be made to remain in place, and water injuring bottom seriously. Contractors protest against further procedure with water jet and ask for board of engineers to pass on same. Work stopped pending decision. Report by mail."

Whereupon, upon the demand of these claimants as contractors, a naval board, of which Captain P. C. Asserson, United States Navy, was president, was convened to examine, among other questions relating to said contract, that of the manner of driving piles in the bottom of said dry dock; and said board, after thorough examination of the questions involved and experimenting with both the water jet and driving by the hammer, reported to the Secretary of the Navy, among other things, as follows, under date of June 30, 1894:

"Board unanimously recommends foundation piles twelve to fourteen inches diameter, pointed, and driven with drop hammer six feet minimum depth below bottom of concrete. All further sheet piling and cut-offs in bottom to be omitted and concrete cut-offs thirty inches thick by six feet depth below foundations substituted therefor under entrance works and on sides in advance of finished floor. Additional foundation piles to be interpolated between those now sunk by water jet."

Thereupon, on the 2d day of July, 1894, the Secretary of the Navy telegraphed to the commanding officer at Puget Sound Naval Station as follows:

"Recommendations of Asserson Board as per telegram of June 30th approved. Direct board to estimate increase or decrease of cost in accordance with seventh clause of contract. Show estimate to contractors; final resistance to piling as per specifications; let work proceed."

Thereafter the remainder of the piles in the bottom of said dry dock were driven in the manner employed previously to the experimental use of the water jet, to the satisfaction of the inspectors on said work and of the engineer in charge, and were approved by said inspectors and
8 engineer and by the Department, subject only to the requirement that the same should be driven to a depth of not less than six feet, which depth was readily reached by the use of the hammer and without the employment of the water jet or any means of a similar character.

The claimants, on or about the 24th day of July, in the year 1894, at the request of the board hereinbefore referred to, of which Captain P. C. Asserson was president, submitted to said board a full and correct statement showing the amount of expense incurred by them growing out of the experiments with said water jet, as follows:

"For labor and materials in experimenting jetting and pulling piles and making tests for Asserson Board of Engineers, and previously.

May 23.	To 1 force pump	$700.00
	" piping and connections for pump	187.00
	" hose lines and tackle	60.00
	" labor setting up plant	106.70
	" blacksmithing, staples, tongs, and eyebolts	16.55
July 5.	To 2,732 lin. ft. round piles used from May 27th to July 5 in experiments, 5c	136.60
	" labor in driving piles by water jet from May 27th to June 12th	183.35
	" labor testing and pulling piles for Asserson Board from June 25th to July 5th	390.95
	" pumping for water jet	75.00
	" general pumping during construction, one-fourth of total cost, 15 days, at $7.50	112.50
	" extra cutting off of piles raised by use of water jet	5.00
		$1,972.65
	Profit, 10 per cent	197.26
		$2,169.91

9 Said board, upon consideration of said account, made the following recommendation by report to the Secretary of the Navy, dated August 1, 1894:

"The board recommends that additional compensation be allowed and paid for cost of experimenting in jetting piles, May 27th to June 12, and in driving and pulling test piles, June 25 to July 5, as follows:

May 27 to June 12—	
2,508 lin. ft. round piles, driven, at 15c	$376.20
Labor in setting up plant, ironwork, &c	123.25
Use of special pumping plant, appliances, &c	150.00

June 25 to July 5th—

224 lin. ft. round piles used to replace those pulled by board, at 5c	$11.20
Labor, use of machinery, appliances, &c	390.95
Total	1,051.60
Add for profit 10 per cent	105.16
	$1,156.76

Said board, though expressing the opinion that the contractors were equitably entitled to a reasonable compensation for any additional expense incurred by them in the prosecution of the work in consequence of unusual delays that may be found to have been caused by the Government, yet held that they were unable to properly consider that question, in view of their having no means of verifying the claim for such additional compensation, and for that reason the voucher issued in accordance with their recommendation, as hereinbefore stated, did not include any consideration of such delay, and no question in regard thereto has been referred by the Secretary of the Treasury to this court in this proceeding, and the claimants reserve all rights of action in that particular.

Thereupon, and after the submission of the report of said board, the following voucher was issued by the Navy Department:

10 "*Special voucher.*

"NAVY DEPARTMENT,
"BUREAU OF YARDS AND DOCKS.

"*The United States to* Byron Barlow & Co., *Dr.*

"'Appropriation: Dry dock, Puget Sound.'
1894.

Sept. 25th. Extra allowance for cost of experimenting in jetting piles, etc., as recommended by the 'Asserson board' August 1, 1894, viz:

2,508 lin. ft. round piles, jetted, at 15 cents	$376.20
Labor, setting up jetting plant, ironwork, etc	123.25
Use of special pumping plant and appliances	150.00
Cost of experimenting by board	390.95
224 lin. ft. round piles to replace those pulled by board, at 5 cents	11.20
	$1,051.60
Add 10 per cent profit	105.16
Amount due	$1,156.76

"NAVY DEPARTMENT.

"The work covered by this bill was verbally authorized by me on May 21, 1894.

"H. A. HERBERT,
"*Secretary of the Navy.*

"Oct. 11, 1894.

"Having fully examined the above charges, I certify that they are in all respects in conformity with the written findings and report of the Asserson board, dated August 1, 1894.

"F. C. PRINDLE,
"*Civil Engineer, U. S. N.*

"Received the above as charged at Puget Sound Naval Station, this 25th day of September, 1894.

"F. C. PRINDLE,
"*Civil Engineer, U. S. N.*

11

"U. S. NAVY-YARD,
"PUGET SOUND U. S. NAVAL STATION,
"*26th September, 1894.*

"Approved for the sum of one thousand one hundred fifty-six dollars and seventy-six cents.

JOHN C. MORONG,
"*Comdr., U. S. N., Commandant.*

"NAVY DEPARTMENT, BUREAU OF YARDS AND DOCKS,
"*11th October, 1894.*

"Approved in quadruplicate for eleven hundred and fifty-six dollars and seventy-six cents, for settlement by the accounting officers of the Treasury from the above appropriation.

"E. O. MATTHEWS,
"*Chief of Bureau.*"

The claimants hereby expressly reserve all other or additional rights of action growing out of this contract, the present reference by the Secretary of the Treasury being wholly confined to the single claim or matter of the work connected with the water jet, and for which the voucher in question was issued.

No other action than as aforesaid has been had on this claim in Congress or by any of the Departments.

The claimants are the sole owners of this claim and the only persons interested therein; and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimants are justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimants are citizens of the United States, and have at all times borne true allegiance to the Government thereof, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimants believe the facts as stated in this petition to be true. And the claimants pray that the facts may be found as hereinbefore stated, and that the court will find as a conclusion of law that they are entitled to be paid the value of the work done by them in connection with said dry dock, and that the court will report its findings of fact and conclusions of law to the Secretary of the Treasury, as provided in section two of the act approved March 3, 1883.

GEORGE A. KING,
RUFUS H. THAYER,
Attorneys for Claimants.

DISTRICT OF COLUMBIA, *ss:*

James E. Blackwell, being duly sworn, deposes and says: I am one of the claimants in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

JAS. E. BLACKWELL.

Subscribed and sworn to before me this 8th day of January, 1897.

MARTHA M. BECK,
[SEAL.] *Commissioner of the Court of Claims.*

12 III. *General Traverse.*—Filed May 21, 1900.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

L. A. PRADT,
Assistant Attorney-General.

13 In the Court of Claims, December term, 1896.

BYRON BARLOW, JAMES E. BLACKWELL, AND JAMES M. DOUGAN, partners doing business under the firm name and style of Byron Barlow & Co.
v.
THE UNITED STATES.
No. 20698.

IV. *Petition.*—Filed January 13, 1897.

To the Honorable the Court of Claims:

The claimants, Byron Barlow, James E. Blackwell, and James M. Dougan, respectfully represent:

The claimants, Byron Barlow, James E. Blackwell, and James M. Dougan, as copartners in business under the firm name and style of Byron Barlow & Co., all of the city of Tacoma, in the State of Washington, did, on the 29th day of October, in the year 1892, enter into a contract with the United States as the accepted bidders under advertisement for the construction of a dry dock at the United States naval station on Puget Sound, in the State of Washington, for particulars of which contract reference is made to the contract itself.

Said contract was accompained by certain plans and specifications, as to the particulars of which reference is made to the originals, which, or certified copies of which, will be duly filed in this cause.

The claimants thereupon proceeded with the execution of said contract in strict accordance with the terms thereof.

14 *Claim I. Extra cost of other sandstone required.*

In pursuance of that clause of the specifications which provides, under the head of "Stone masonry," that "the ashlar must be of granite or sandstone, of quality approved by the engineer," the claimants in submitting their proposals under the advertisement for said contract had submitted one bid based upon the use of sandstone for the ashlar, and another, of larger amount, based upon the use of granite, and the acceptance of their proposal by the Navy Department was of the lower bid, based upon the use of sandstone.

The claimants thereupon submitted to the engineer in charge a sample of certain sandstone, known as Tenino sandstone, in all respects in accordance with the specifications, and suitable for use upon the work, and the same was approved by the engineer in charge.

Thereupon, on the 4th day of May, in the year 1893, the claimants entered into a contract with George N. Vantine, Wesley D. Fenton, and Charles A. Billings, doing business under the firm name and style of *the* The Tenino Stone Quarry Company, whereby said company agreed to furnish and deliver to the claimants all of the sandstone required for the work under their contract.

Said company thereupon proceeded to furnish the sandstone required, and did, on the 20th day of June, 1893, furnish a considerable quantity, which was delivered by the claimants at the site of the work, and was in all respects suitable for use under their contract with the United States, and was inspected and accepted by the civil engineer of the United States Navy in charge of said work, and for which said civil engineer issued a voucher for payment, which voucher was approved by the commanding officer of the Puget Sound Naval Station and forwarded to the Navy Department for payment.

15 Shortly after the delivery of said stone at the site of said dry dock, to wit, on the 28th day of June, in the year 1893, the claimants entered into a contract with Albert Beaudette and Louis Beaudette, stone cutters, doing business under the firm name and style of Beaudette Brothers, to cut said stone, and all of the stone required under their contract for the construction of said dry dock, to the dimensions required by the contract, the claimants to pay for the same at the rate of seven dollars (87) per stone. But before any of the stone had been cut under said contract, to wit on the 8th day of September, in the year 1893, the claimants were notified by the civil engineer of the United States Navy in charge of said work that in a letter dated August 31, 1893, the chief of the Bureau of Yards and Docks, referring to the Tenino sandstone, "declined to accept the same as proper material for the stone masonry for the dry dock construction," and requested the claimants to furnish him, said engineer, with samples of such other sandstone as they might select, in order that the same might be subjected to test and analysis. Said engineer, however, did not at that or any other time express any disapproval on his part of said Tenino sandstone, but was then and at all times satisfied with the same, and would have continued the acceptance of the same, stating as late as the 14th day of June, 1894, in a letter to a member of the firm constituting said Tenino Stone Quarry Company that—

"When I accepted the stone from your quarry for use in the dry dock

here, I considered it entirely suited for the work. Since then I have had no reason for changing my views. I still consider the product of your quarry a most excellent stone, and suitable for the work."

Upon being notified, however, of the requirement made by the
16 Bureau of Yards and Docks that other stone be furnished, the claimants, though protesting against such ruling, entered into a contract with John A. Soderberg, lessee from E. W. Johnston of a certain quarry known as the Dog Fish Point Quarry, and furnished stone from the same, which stone was accepted. Said quarry, however, was soon exhausted, as to its capacity to furnish stone of so large a size as was required for said dry dock.

The claimants having then exhausted all means of obtaining stone of suitable size by private contract, carefully inquired as to where any stone could be obtained of suitable quality, capable of being cut into the required size for use in the entrance of said dry dock, and the civil engineer of the United States Navy in charge of said work also made careful inquiry in regard thereto, and in a report addressed to the commandant of said Puget Sound Naval Station, and by him transmitted to the Navy Department, stated that the only suitable stone was a hard sandstone to be found on Sucia Island, which island constituted a Government reservation for light-house purposes.

Thereupon the claimants applied to the Secretary of the Treasury for permission to quarry stone on said island, and after obtaining the required permission opened at great expense a quarry on said island, and brought from San Francisco all the force of stonecutters required to cut said stone to the dimensions required for the work on said dry dock, and at an expense greatly exceeding that which would have been necessary in the case of the Tenino sandstone.

The claimants were also sued by the aforesaid Beaudette Brothers in an action claiming damages amounting to five thousand two hundred and two dollars ($5,202) for breach of their contract by failing to furnish stone for them, said Beaudette Brothers, to cut, as was required
17 by their contract, which action is still pending in the superior court of Kitsap County, in the State of Washington.

The claimants therefore claim as follows:

1. Reimbursement for Tenino sandstone furnished and quarried	$5,995.45
2. Reimbursement for damage suit by Beaudette Brothers for cutting	5,202.00
3. Reimbursement for cost of furnishing and cutting other sandstone in excess of what Tenino stone would have cost	19,178.98
Total	$30,376.43

Claim II. Extra foundations for boiler house and boilers.

In the construction of the boiler house and boilers the claimants laid the foundations for the same under the direction and to the acceptance of the civil engineer of the United States Navy in charge of said work on behalf of the United States, who embraced all the items thereof in his

monthly estimate which he transmitted to his superior officer for payment. The successor, however, of the engineer first in charge objected to said foundations, and required that the foundations of the boilers be entirely removed and renewed and that those of the boiler house be strengthened.

The claimants protested against being required to do over again any work already once done to the satisfaction and acceptance of the engineer in charge, and insisted that if done, it be at the expense of the Government, and proceeded to do the work as ordered accordingly.

The reasonable value of said work, and which the claimants hereby claim, was as follows:

1. Extra foundations for boiler house	$312.12
2. Extra foundations for boilers	384.56
Total	$696.68

18 *Claim III. Extra work at exit of brick discharge culvert.*

In the original drawings for the work at the exit of the brick discharge culvert the concrete and timber work forming the foundations at the brick arch were shown as stopping at a certain vertical line given on said drawings. It was subsequently determined by the Bureau of Yards and Docks, in order to prevent the washing out of the material under said foundation, to put in a row of sheet piling across the exit of said culvert, and this was afterwards embodied in a separate contract under which the claimants were paid for the same.

It was afterwards decided by the Bureau of Yards and Docks that a concrete toe should be put against said sheet piling to prevent the same from being destroyed by the teredos, and the civil engineer of the Navy in charge of said work on behalf of the Government informed the claimants, they not having time to submit an estimate and have the price agreed upon, that they might do the work and afterwards put in their bill for the same, and he would transmit it to the Bureau of Yards and Docks with his recommendation for payment, which he did on the 25th of July, 1895. The Bureau of Yards and Docks, however, on or about the 1st day of August, in the year 1895, refused to recognize any extra charge for said concrete toe, insisting that both the sheet piling and the concrete toe were required in order to prevent the teredos from attacking the timber which was laid on the piling, and which timber was required to be so laid in consequence of the piles having been, by mistake of the claimants, cut off too low; whereas, in point of fact, neither the sheet piling nor the concrete toe was required in any manner as a consequence of said mistake, but said sheet piling would have been equally required to protect the piles and timber
19 work had said work been constructed as originally designed, and said sheet piling had in accordance with this view, therefore, been made the subject of a separate contract and paid for as such, and said concrete toe was required only to protect the same.

The reasonable value of the extra work on said concrete toe amounted to $59.35, which amount the claimants hereby claim.

Claim IV. Reimbursement for being required by civil engineer to ram or sluice all filling, when not called for by contract and specifications.

In the specifications accompanying the contract for said dry dock there was no requirement that the filling around the dry dock should be rammed, or sluiced, the only reference to the refilling of earth contained in said specifications being as follows:

"All earth excavated, and not required for refilling or grading within the limits of structures, is to be deposited within the limits of the station, at reasonable distances from the dock, where indicated by the commandant, not to exceed 1,000 feet from the dock, and brought up to the grade of the station as established."

* * * * * * *

"Upon completion of the work, the surface is to be evenly graded from coping back to the line of sheet piling and around the pump-house, to correspond with the grade of the station adjoining, as the civil engineer or other officer in charge may direct."

In refilling the dirt after the altars were in place, under the direction of the civil engineer of the United States Navy then in charge of said work, no part of the filling was rammed or sluiced except the clay puddling, as under his interpretation of the specifications and contract the same was not required and had not been done on the dry
20 dock shortly before that constructed at the navy-yard at Norfolk, Virginia. Subsequently, however, the successor of the civil engineer first in charge raised the question of ramming the back filling behind the altars and, upon the claimants objecting thereto, referred the question to the Bureau of Yards and Docks, and on the 13th day of November, in the year 1894, informed the claimants that said Bureau, on the 3d day of November, 1894, held that the contractors were required under their contract to ram the back fillings to whatever extent was required for the satisfaction of the inspector in charge. The claimants protested that this was not required by the specifications, and that no ramming or sluicing of the filling was ever required in railroad or other similar work by the custom of contractors in work of this character unless distinctly specified. The claimants, though thus protesting that the same was not required by the specifications and in accordance with the demand made on behalf of the Government, sluiced with water all of the material inside of the sheet piling surrounding the dock.

By reference to the specifications it will be seen that the claimants were required, in making proposals for the work, to submit a classification of the cost at schedule prices to aggregate the total contract price. In accordance with this requirement the claimants submitted a schedule of prices, which was approved and incorporated in the contract, and under which, among other items, was contained one "For filling and grading, per cubic yard, thirty cents," but such schedule contained no mention of ramming or sluicing the fillings. Subsequently the claimants entered into a supplemental contract for adding wing and approach walls to the entrance of the dock, under which they were allowed by a board of naval officers, of which Captain P. C. Asserson, civil engineer, United States Navy, was president, at the rate of forty-
21 five cents per cubic yard for all filling which was to be rammed, besides a profit thereon of ten per cent, thus showing that the

ramming of fillings was regarded by said board as extra and additional to the work of filling itself.

The claimants therefore claim ten cents per cubic yard for 37,227 cubic yards of filling, rammed or sluiced, amounting to $3,722.70.

Claim V.—Damages for delay caused by Government in driving piles.

From the 13th day of April, in the year 1894, to the 5th day of July, 1894, being seventy (70) days, exclusive of Sundays, the claimants were delayed in the work of driving piles in the foundations of said dock by the order of the Navy Department suspending the same on the former date for the purpose of experimenting with the method of driving piles by water jet, as is more fully and at large set forth in the petition of these claimants in the case already entered on the docket of this court as Department case No. 50. In said case, referred to as Department case No. 50, the Secretary of the Treasury has referred to this court for adjustment the claim for the expense in making the experiments to jetty said piles, or piling, and testing the same for the board during its visit in June, 1894, and for the additional expense of interpolating new piles between those already driven in order to repair the damage thereby done to the bottom. In regard to the question, however, of the damage for delay, the Asserson board of civil engineers, whose report has been hereinbefore referred to and is more particularly mentioned in the petition of these claimants in Department case No. 50, reported as follows:

22 "ARTICLE 26 e 5. The board is of the opinion that the contractors are equitably entitled to a reasonable compensation for any additional expense incurred by them in the prosecution of the work, in consequence of unusual delays that may be found to have been caused by the Government, but having no means of verifying the claim submitted for such additional compensation the board is unable to properly consider this question."

The claimants being delayed from the date of the order suspending work on the 13th of April, 1894, till the 5th day of July, 1894, the date on which they were able to resume work after being properly notified, therefore claim the actual cost to them of such delay, computing therein only the actual and necessary daily expense of the men actually and permanently employed, and the material necessary for use, and excluding therefrom all who were laid off without pay during this period. Thus computed such expense amounts to seventy-five dollars ($75) per day, a total for the seventy (70) days of suspension of $5,250.

RECAPITULATION.

Claim I. Extra cost of other sandstone after Tenino stone had been accepted and then condemned:	
Item 1. Reimbursement for Tenino stone furnished and quarried	$5,995.45
Item 2. Reimbursement for damage suit by Beaudette Bros. for cutting	5,202.00
Item 3. Reimbursement for cost of furnishing and cutting other sandstone in excess of what Tenino stone would have cost	19,178.98
Amount carried forward	$30,376.43

23	Amount brought forward	$30,376.43
	Claim II:	
	(*a*) Extra foundations for boiler house	312.12
	(*b*) Extra foundations for boilers	384.56
	Claim III. Extra work at exit of brick discharge culvert.	59.35
	Claim IV. Reimbursement for being required by civil engineer to ram or sluice all filling, when not called for by contract and specifications	3,722.70
	Claim V. Damages for delay caused by Government in driving piles	5,250.00
	Total claims	$40,105.16

The claimants submitted this claim to the Secretary of the Navy on the 11th day of March, in the year 1896, but said Secretary, without passing upon the merits thereof, held on the 28th day of April, in the year 1896, in a communication in writing addressed to the claimants, "that the nature of said claims is such that the Department is wholly without authority, under the statutes, to consider the same with a view to their adjustment and payment, and that it will therefore be necessary to their settlement that you submit them to the Court of Claims for its determination."

In the final settlement made and release given in pursuance of the terms of section 6 of article 12 of the contract, and given under the signature of the claimants the 20th day of September, 1896, the claims hereinbefore set forth, and which had on the 11th day of March, 1896,
24 as just hereinbefore stated, been presented to the Secretary of the Navy, were expressly excepted and excluded therefrom, without prejudice.

No other action than as aforesaid has been had on this claim in Congress or by any of the Departments.

The claimants are the sole owners of this claim and the only persons interested therein; and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimants are justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimants are citizens of the United States, and have at all times borne true allegiance to the Government thereof, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimants believe the facts as stated in this petition to be true. And the claimants claim forty thousand one hundred and five dollars and sixteen cents ($40,105.16).

GEORGE A. KING,
RUFUS H. THAYER,
Attorneys for claimants.

DISTRICT OF COLUMBIA, *ss:*

James E. Blackwell, being duly sworn, deposes and says: I am one of the claimants in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

JAS. E. BLACKWELL.

Subscribed and sworn to before me this 13th day of January, 1897.

[SEAL.] MARTHA M. BECK,
Commissioner of the Court of Claims.

25 V. *General traverse*—Filed May 21, 1900.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

L. A. PRADT,
Assistant Attorney-General.

26 VI. *Motion to consolidate causes for trial*—Filed July 24, 1897.

BYRON BARLOW, JAMES E. BLACKWELL, AND James M. Dougan, partners doing business under the firm name and style of Byron Barlow & Co., *vs.* THE UNITED STATES.	General jurisdiction No. 20698. Department case No. 50.

Now come the claimants in these causes and move the court that these causes be consolidated for trial.

GEORGE A. KING,
RUFUS H. THAYER,
Attorneys for Claimants.

I assent.

G. H. GORMAN,
Assistant Attorney.

Allowed subject to exceptions if any are filed.

CHARLES B. HOWRY, *Judge.*

27 VII. *Findings of fact and conclusions of law*—Filed May 21, 1900.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

On the 29th of October, 1892, the following contract was entered into between the claimants and the United States:

"*Contract for the construction of a dry dock to be located at the U. S. naval station, Puget Sound, Washington.*

"This contract, of two parts, made and concluded this twenty-ninth day of October, A. D. 1892, by and between Byron Barlow, James E.

Blackwell, and J. M. Dougan, all of the city of Tacoma, Pierce County, State of Washington, copartners in business under the firm name of Byron Barlow & Company, and hereinafter designated as the contractors, parties of the first part, and The United States, represented by Commodore N. H. Farquhar, U. S. Navy, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part.

"Whereas, by advertisement, dated August 8, 1892, proposals were invited by the Chief of the Bureau of Yards and Docks, Navy Department, for the construction, by contract, of a dry dock of the general dimensions, and to be located at the place therein specified; and

"Whereas the proposal of the said contractors, dated September 3, 1892, to construct a dry dock to be located at the United States naval station, Puget Sound, Washington, has been duly accepted by the Secretary of the Navy:

"Now, therefore, this contract witnesses: That, in consideration of the premises, and for and in consideration of the payments to be made as hereinafter provided for, the parties of the first part, for themselves, their heirs, and assigns, and their personal and legal representatives, do hereby covenant and agree to and with the United States as follows—that is to say:

"First. The contractors will, within sixty days after the date of the notice to them that they are given the possession and occupancy of the site by the party of the second part, which possession and occupancy of the said site during the period of construction, and until the completion and delivery of the work hereinafter mentioned, shall be secured to the contractors by the party of the second part, commence, and within thirty-six calendar months from the expiration of said sixty days, construct and complete, ready to receive vessels, a dry dock, to be located at the place shown on a plan accompanying this contract, at the naval station,
28 Puget Sound, Washington; and will, at their own risk and expense, furnish and provide all labor, materials, tools, implements, and appliances of every description—all of which shall be of the best kind and quality adapted for the work as described in the specifications—necessary or requisite in and about the construction of said dry dock and the caisson, pumping machinery, pump house, culverts, and all other accessories and appurtenances, in accordance with the aforesaid plans and specifications, subject to the approval of the civil engineer, or such other competent officer or person or persons as may for that purpose be designated by the party of the second part; it being further mutually stipulated and agreed that the officer or officers, person or persons, thus designated shall and may, from time to time during the progress of the work, inspect all material furnished and all work done under this contract, with full power to reject any material or work, in whole or in part, which he or they may deem unsuitable for the purpose or purposes intended, or not in strict conformity with the spirit and intent of this contract and with the aforesaid plans and specifications, and to cause any inferior or unsafe work to be taken down, by and at the expense of the contractors; and that all such rejected material shall be at once removed from the station and replaced by material satisfactory to such inspector, and that all such inferior or unsafe work shall be replaced by satisfactory work, by and at the expense of the contractors. Such inspectors shall at

all times during the progress of the work have full access thereto, and the contractors shall furnish them with full facilities for the inspection and superintendence of the same.

"It is further mutually stipulated and agreed that at and upon the request of the civil engineer, or other officer in charge, any disorderly, careless, or incompetent person or persons employed by the contractors, in or about the work to be done under this contract, shall be at once discharged and not again employed therein; and that all necessary and suitable precautions shall be taken by the contractors, during the progress and until the final completion of such work, to avoid or prevent accidents, and that the contractors will indemnify and save harmless the party of the second part from all claims against the United States, and from all actions and proceedings at law, and from all costs and damages for or by reason of any injury to person or property, resulting from, or directly or indirectly attributable to, any accident or accidents which may occur in or during the prosecution of the work and in connection therewith or any part thereof, or to any carelessness or negligence, wilful or otherwise, of any person or persons employed by the contractors, or to the use of improper or defective materials, or to any act or omission of the contractors prior to the final acceptance of the said dry dock.

"Second. The contractors will at all times during the progress of the work give their personal supervision and attention to the same and to every part and detail thereof, and in case of their absence will have a competent representative or foreman present, authorized to act for them in all matters connected with the work, and to receive and follow directions relating thereto when given by the civil engineer, or other officer in charge; and for all acts and omissions of such representative or foreman in the premises the contractors shall be responsible.

"Third. The contractors will, from time to time, as the same may accumulate during the progress of the work, remove all refuse material and rubbish connected therewith, and any portion of such refuse material or rubbish which the contractors may agree to deposit within the limits of said station shall be so deposited by the contractors, at their own expense, where the commandant may direct, within reasonable
29 distance from the work. On the completion of the work the surroundings shall be thoroughly cleaned up, filled, and graded to the established level or levels of the station as the civil engineer, or other officer in charge, may direct, and all plant and surplus material, including the cofferdam and its filling, shall be removed, by and at the expense of the contractors, without unnecessary delay.

"Fourth. The contractors stipulate and agree to remove any and all obstructions at and in front of the entrance of the said dry dock occasioned by the construction of the cofferdam without extra charge.

"Fifth. Insurance to the amount of fifty thousand dollars ($50,000) shall be effected in such manner and in such companies as shall be approved by the Chief of the Bureau of Yards and Docks, which insurance shall be renewed from time to time at the expense of the contractors; the loss, if any, to be stated in the policies as payable to the United States, for whom it may concern.

"Sixth. The contractors shall hold and save the United States harmless from and against all and every just and legal demand or demands of any nature or kind, for or on account of the adoption of any plan, model,

design, or suggestion, or for or on account of the use of any patented invention, article, or appliance, which has been or may be adopted or used in or about the construction of the said dry dock, its accessories and appurtenances, or any part thereof, under this contract, or its use after completion, and to protect and discharge the Government from all liability on account thereof by proper releases from patentees or otherwise, and to the satisfaction of the Secretary of the Navy, before final payment under this contract shall be made, excepting in the case of such methods, constructions, and appliances for which the Government owns the right, or has received license.

"Seventh. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractors, and all claims for extra compensation by reason of, or for or on account of, such extra performance, are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect, except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change or modification in the aforesaid plans and specifications, such change or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof which the contractors shall receive, if any: Provided, That whenever the said changes increase or decrease the cost by a sum exceeding five hundred dollars ($500) the actual cost thereof shall be determined by a board of naval officers appointed for the purpose, and the contractors shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation they shall be entitled to receive in consequence of such change or changes: And provided also, That no further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part: And provided further, That no change herein provided for shall in any manner affect the validity of this contract.

"Eighth. The aforesaid dry dock and its accessories and appurtenances and each and every part thereof, shall be constructed of approved materials and in a thoroughly substantial and workmanlike manner, in accordance with the true intent, meaning, and spirit of the contract, plans, and specifications, to the satisfaction of the party of the second part.

"Ninth. In case the completion of the said dry dock, its accessories and appurtenances shall be delayed beyond the said period of thirty-six (36) calendar months, deductions of fifty dollars ($50) per day during the first three months following the expiration of said period, and of one hundred dollars ($100) per day for each and every day beyond the expiration of the said three months, may, in the discretion of the Secretary of the Navy, be made from the contract price of said dry dock; all such deductions to be made, from time to time, from any payment or payments falling due under the contract: Provided, however, That such delays shall not have been caused by the act of the United States or its officers or agents, or by fire or water, or by any strike or stand out of workmen employed in or about the work, or by other circumstances beyond the control of the contractors: And provided further, That in case of such alleged delay the contractors shall give immediate notice thereof to the Secretary of the Navy.

"In case any question shall arise under this contract concerning penalties, such question, with all the facts relating thereto, shall be submitted to the Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon all the parties to this contract. All delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the dry dock within the times herein specified therefor, shall entitle the contractors to a corresponding extension of the period herein prescribed for the completion of said dry dock: Provided, however, That no delay, attributed by the contractors to the Department, its officers or agents, or the alleged cause or causes thereof, shall be considered by the Secretary of the Navy unless the contractors shall, at the time of the occurrence of such delay, notify him in writing of the facts and circumstances in each case, and of the extent to which they claim that the final completion of the dry dock is thereby delayed.

"Tenth. It is mutually understood, covenanted, and agreed, by and between the parties hereto, that the said dry dock shall not be accepted and that the contractors shall not be entitled to the final payment or to reservations previously made until twenty days after a complete test of said dock shall have been had under the direction of such officers as may be designated by the party of the second part, such test to consist of a full test of the pumping machinery in pumping out the dock, and the docking of such vessel as the party of the second part may direct; the emptying of the dock, the refilling of the dock, and the removal of such vessel, without any indication whatever of any defect,
31 weakness, or settlement, due to faulty material or workmanship, in said dock or either of its accessories, and the results of such test to be, in all respects, to the full and complete satisfaction and approval of the officers designated to superintend the same. Such test shall be made within thirty days after the contractors shall have notified the party of the second part of the completion of the dock, and a decision upon the question of acceptance made within twenty days thereafter; it being understood and agreed, nevertheless, that prior to the said test, the party of the second part shall, at their own expense, remove,

by dredging or other process, all obstructions of earth, clay, or other materials necessary to be removed in order to obtain free ingress for vessels to the entrance of said dry dock; said removal to be effected in sixty days from the date of removal of the front cofferdam, and notification thereof by the contractors that the said dam is removed, and that they (the contractors) are ready for the party of the second part to proceed and continue with the removal of the said obstructions.

"Eleventh. It is further mutually understood, covenanted, and agreed that in case of the failure or omission of the contractors, at any stage of the work prior to final completion, from any cause or causes other than those specified in the ninth clause of this contract, to go forward with the work and make satisfactory progress towards its completion within the prescribed period, it shall be optional with the Secretary of the Navy to declare this contract forfeited on the part of the contractors by giving notice in writing to that effect to them; and upon the giving of such notice, the contractors shall be indebted to the United States as for liquidated and ascertained damages in a sum equal to the aggregate of all advance payments made to them for or on account of the work done under the contract, and agree to refund the same on demand, within sixty days, and the United States shall hold as collateral for such refund the dock and its appurtenances, or such part or parts and materials as shall have been furnished. Such further steps shall then be taken towards the completion of the dock and its appurtenances, and the adjustment of the rights of the contractors and the Government thereunder, as are provided in the specifications forming a part of this contract.

"In case the said Secretary shall, under the provisions of this clause, declare this contract forfeited, such forfeiture shall not affect the right of the United States to recover for defaults which may have occurred hereunder, and as liquidated damages, a sum of money equal to the penalty of the bond accompanying the same: Provided, however, That if the contractors shall, by any of the clauses specified in the ninth clause of this contract, be prevented either from commencing or completing the work at the time agreed upon in this contract, such additional time may, in writing, be allowed them for such commencement or completion as, in the judgment of the Secretary of the Navy, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

"Twelfth. The covenants, conditions, and provisions relating to payments under this contract are hereby mutually understood and agreed upon by and between the respective parties as follows, that is to say:

"1. The contract price to be paid for the dry dock and its accessories and appurtenances to be constructed in accordance with this contract shall be four hundred and ninety-one thousand four hundred and sixty-five dollars ($491,465.00) United States currency.

32 "2. The amount of material provided and of work performed by the contractors, monthly, shall be taken as a basis for making payments under.

"3. The officer in charge shall, on or before the fifth day of each month during the progress of the work, prepare an estimate of the work done and materials furnished and delivered during the month preceding the first day of the month then current, according to the rates specified in the schedule aforesaid, and certify as to the amount properly payable thereunder, which estimate shall be submitted to the commandant of the station where such dock is in course of construction for his approval.

"4. When such estimates shall have been approved by the commandant as aforesaid, the respective amounts thereof, less ten per cent, shall be paid through the issuance and delivery to the contractors of bills in triplicate, duly certified by the officer in charge, and approved by said commandant and the Chief of the Bureau of Yards and Docks, and every such payment shall be deemed a payment on account of the aforesaid contract price: Provided, That no payment shall be made except as funds are available under appropriations made by Congress, for the construction of the work, from time to time.

"5. The reservation of ten per cent on each monthly payment as above provided for shall be held until this contract shall have been fully performed by or on the part of the parties of the first part, and the said dry dock, its accessories and appurtenances, shall have been finally accepted by the party of the second part; and no monthly or other payments shall be made under this contract, except upon approval by the officer in charge of all work done and material furnished at the rates specified in the schedule of prices up to the first of the month previous to the date of such payment, nor without satisfactory evidence, such as a county clerk's certificate, furnished by the contractors to said officer, that there are no existing liens other than that of the United States upon such work or materials at the date of such approval.

"6. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the contractors, they shall be entitled, within ten days after the filing and acceptance of their claim, to receive the said reserve, and any sum or sums not covered by the monthly estimates and payments, or so much thereof as they may be entitled to, on the execution of the final release to the United States, in such form as shall be approved by the Chief of the Bureau of Yards and Docks, of all claims of any kind or description under or by virtue of this contract.

"Thirteenth. It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition, that no Member of or Delegate to Congress, officer of the Navy, or any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract, or to any benefits to arise therefrom; that this contract shall not, nor shall any interest therein, be transferred by the contractors to any other person or persons, and that any such transfer shall subject the contractors to a forfeiture of their rights hereunder, all right of action to recover for any breach of this contract being, however, reserved to the United States.

Fourteenth. It is expressly understood, covenanted, and agreed, by and between the parties to this contract, that if any doubts or disputes as to the meaning or requirements of anything in this contract, or if any

discrepancy appear between the aforesaid plans and specifications and this contract, the matter shall be at once referred for the consid-
33 eration and decision of the Chief of the Bureau of Yards and Docks, and his decision thereon shall be final, subject, however, to the right of the contractors to appeal from such decision to the Secretary of the Navy, who, in case of such appeal, shall be furnished by the contractors with a full and complete statement of the grounds of their appeal, in writing, and shall thereupon take such action in the premises as, in his judgment, the rights and interests of the respective parties to this contract shall require, and the parties of the first part hereby bind themselves and their heirs and assigns, and their personal and legal representatives, to abide by his, the said Secretary's, decision in the premises.

"In witness whereof the respective parties have hereunto set their hands and seals the day and year first above written.

"BYRON BARLOW AND COMPANY. [L. S.]
"BYRON BARLOW. [L. S.]
"JAS. E. BLACKWELL. [L. S.]
"J. M. DOUGAN. [L. S.]
"N. H. FARQUHAR, [L. S.]
"*Chief of Bureau of Yards and Docks.*"

II.

The following specifications were prepared at the Bureau of Yards and Docks of the Navy Department and were exhibited to bidders prior to the awarding of the contract, and are the specifications therein referred to:

"*Specifications for a dry dock for the United States Government.*

"*Location.*—This dry dock shall be located at the United States naval station, Puget Sound, Washington, upon a site shown on a plan accompanying these specifications.

"GENERAL CONDITIONS.

"*Materials.*—All materials are to be of good merchantable quality of the several kinds, where not otherwise specified.

"*Facilities.*—The station authorities are to allow the contractor proper space at the station for landing and storing materials to be used in the construction.

"After completion of the dock and before acceptance of the work by the Government, the contractor shall be required to remove the operating machinery, tools, surplus materials, etc., from the station.

"*Hours of work.*—The contractor shall not be restricted to the hours of labor established for Government employees, and shall be permitted to prosecute the work night and day, if desired, and on Sundays, if deemed necessary by the contractor for the protection of the work.

"*Patents.*—The use of all patented articles and methods employed in the construction of the dock is to be included in the contract without any additional charge or expense to the Government.

"*Intention.*—It is the declared intention and meaning of the contract

to obtain, complete, a substantial dry dock, according to the general plans and specifications, to the entire satisfaction of the Bureau of Yards and Docks. Should there be any omissions in the plans or specifications of any work or material required to secure this result, such work or material is to be regarded as embodied in the plans and specifications and to form a part of the contract.

34 "*Payments.*—The contractor shall submit a fair schedule of prices for materials delivered, materials worked and in place, and for excavation, etc., previous to the commencement of the work, which shall upon approval by the Bureau, govern during the construction of the dock. There shall also be submitted a classification of the cost, at the schedule prices, to aggregate the total contract price, under the following heads, viz:

"Plans, specifications, and superintendence.
"Cofferdams.
"Boiler house.
"Culverts.
"Filling, grading, puddling.
"Capstans, gypsies, etc.
"Pumping plan, complete.
"Pumping during construction.
"Caisson.
"Removal of cofferdam.
"Dry-dock structure proper.

"The amounts under the heads of Plans, etc., and Pumping during construction will be a sum per month, extending over the time from the beginning of the work in question until the time fixed in the contract for completion of the work, which the Bureau may reduce when in its opinion satisfactory progress is not being made, or the time for completion is extended.

"Previous to the first monthly estimate the engineer in charge shall make an estimate, upon the basis of the schedule of prices, of the probable cost of the entire work under the plans and specifications, and if it shall appear that such probable cost, at the prices specified, will exceed the contract price with reference to any item under the classification of prices, then there shall be such pro rata reduction in the said prices as may be necessary in order that the limit of expenditure, under any head of said classification, shall not be exceeded: Provided, That the above condition shall not operate to reduce the total contract price to be paid for the complete performance of the contract.

"Payments are to be made monthly upon bills duly certified, from which ten per cent will be reserved, to be paid on the full and final completion of the contract.

"No payments are to be made except upon materials delivered, materials worked in place, and work performed, at the rates in the schedule of prices.

"The prices for materials delivered shall represent, as nearly as possible, the actual cost of the same to the contractor, delivered on the site.

"*Miscellaneous.*—The contractor shall begin work within 60 days from the date of the notice to him that he is given possession and

occupancy of the site, and he shall progress therewith so as to complete his contract, in all respects, in thirty-six (36) calendar months from the expiration of the said sixty (60) days.

"All delays which the Bureau of Yards and Docks may find properly attributable to the Government or its authorized agents, and to have been delays affecting the final completion of the works, shall entitle the contractor to a corresponding extension of the time for completion: Provided, The contractor shall give to the engineer in charge immediate notice, in writing, of the cause of detention, and of the extent of time he claims to be thereby delayed.

"The whole of the works are to be executed in accordance
35 with the plans which are exhibited for proposals, and such other plans which may be supplied from time to time during the progress of the work, further illustrating the same.

"All work shown only in part on the drawings, or not fully described in the specifications, or in the proposal, and all details omitted, all of which are necessary to the complete and perfect construction, shall be considered as covered by this specification and the contract entered into for the construction of the dock.

"The works included in the contract will be carried out by the contractor, under the inspection and supervision of the civil engineer detailed for the purpose, who will inspect all materials and workmanship, and will have full authority to reject any which in his opinion are not in full accordance with the true spirit, intention, and meaning of the contract, plans, and specifications.

"The contractor shall be responsible for the entire line of works until completion, and acceptance by the Bureau of Yards and Docks. He is required to give his personal attention to the faithful prosecution of the work, and not to sublet or assign the same, but to keep it under his control, and in case of his absence, to have a duly qualified person to look after the works and to receive and follow directions relating thereto, given by the engineer in charge.

"The contractor shall furnish all necessary facilities, should it be deemed advisable by the engineer to make an examination of any work already completed. If the work is found defective in any respect, he shall defray all expenses of such examination and of satisfactory reconstruction. If the work is found perfect, such expenses will be allowed for.

"The contractor must furnish at his own expense all labor and materials necessary for the complete execution of his contract in the best manner.

"He will also assume all risk from storms, fire, floods, damage to persons and properties, and casualties of every description, and maintain the works at his own risk until their final acceptance, without additional compensation.

"Insurance in the amount of fifty thousand dollars shall be effected in such manner and in such companies as shall be approved by the Chief of the Bureau of Yards and Docks, which insurance shall be renewed from time to time at the expense of the contractor; the loss, if any, to be stated in the policies as payable to the United States, for whom it may concern.

"He is required to employ only competent and orderly persons, and will discharge from his employ any who are not so, upon the request of the engineer in charge.

"If, at any stage of the work, the contractor shall fail to go forward with the same, or to make satisfactory progress towards its completion within the specified time, from causes within his control as decided by the Chief of the Bureau of Yards and Docks, it shall be optional with the Secretary of the Navy to declare the contract forfeited on the part of the contractor. The contractor shall, upon receiving notice of such forfeiture, be indebted to the United States as for liquidated and ascertained damages in a sum equal to the aggregate of all advance payments made to him for or on account of work done under the contract, and agree to refund the same on demand, within sixty days, and that the United States shall hold as collateral for such refund, the dock and its appurtenances, or such part or parts as shall have been constructed or furnished. The Secretary of the Navy will thereupon appoint
36 a board of competent persons, which shall ascertain and declare a fair market value of all work done, and materials on hand, including a reasonable and customary margin of profit upon the work done satisfactorily.

"Upon the approval of the findings of said board by the Secretary of the Navy, he may proceed to complete the said dock and appurtenances in accordance with the contract, plans, and specifications, and the title to the dock and appurtenances, or such parts as shall have been completed, and all materials, shall forthwith vest in the United States, and the contractor shall surrender the same, together with the use of the works or plant, and all machinery, tools, and appliances theretofore used or necessary to be used in the completion of the work; any increase in cost incurred by reason of the failure of the contractor to be at the contractor's expense. If, however, any balance shall appear in favor of the contractor, it shall be paid to and accepted by him in full discharge of all claims under the contract.

"In case the completion of the dry dock, its accessories, and appurtenances shall be delayed beyond the said period of 36 calendar months, deductions of fifty dollars per day during the first three months following the expiration of said period, and of one hundred dollars per day for each and every day beyond the expiration of the said three months, may, in the discretion of the Secretary of the Navy, be made from the contract price of said dry dock; all such deductions to be made from time to time from any payment or payments falling due under the contract; provided, however, that such delays shall not have been caused by the act of the United States or its officers or agents, or by fire or water, or by any strike or stand-out of workmen employed in or about the work, or by other circumstances beyond the control of the contractor; and provided further, that in case of such alleged delay the contractor shall give immediate notice thereof to the Secretary of the Navy.

"In case any question shall arise under the contract concerning deductions from the contract price of said dry dock, such question, with all the facts relating thereto, shall be submitted to the Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon all the parties to the contract.

"All proposals must be in duplicate, upon forms provided for the purpose by the Bureau of Yards and Docks.

"Proposals must be signed by the bidder submitting them, with his usual signature in full. When a firm is a bidder, the member of the firm or agent who signs the firms name to the proposal shall state, in addition, the names of all the individuals comprising the firm. Any one signing the proposal as the agent of another, or of others, must file with it legal evidence of his authority so to do.

"The place of residence of every bidder must be given.

"Prices must be written in words as well as expressed in figures.

"If a bidder wishes to withdraw his proposal, he may do so before the time fixed for the opening, by stating his purpose in writing to the Chief of the Bureau of Yards and Docks, who holds it, and when his proposal is reached it shall be handed to him, or his authorized agent, unread.

"The bidder must satisfy the Government of his ability to furnish the materials and perform the work.

"Reasonable grounds for supposing that any bidder is interested in more than one bid will be cause for the rejection of all bids in which he is interested.

"The Government reserves the right to waive any informality, to reject the bid of any failing bidder or contractor, and to reject any or all bids as may be for its interests.

37 "No Member of or Delegate to Congress, nor any person belonging to or employed in the military, naval, or civil service of the United States, will be permitted to have any share in the contract for this work.

"The attention of bidders is invited to the acts of Congress which prohibit the importation or immigration of foreigners and aliens under contract or agreement to perform labor in the United States or Territories, or the District of Columbia.

"Each proposal must be accompanied by satisfactory surety or certified check, in the penal sum of $25,000, to the effect that the bidder will, within 15 days after the notice of the acceptance of his proposal, execute the required contract, and give a bond, with satisfactory surety, in a penal sum equal to twenty (20) per cent of the contract price, conditioned for the faithful performance of the contract.

"Bids received after the time of opening will not be considered.

GENERAL DESCRIPTION.

"The dry dock will be built of timber and concrete from the abutments inward, and the remainder, forming the entrance works, of concrete and stone masonry. The entire structure will be founded upon piles, as shown in the plans, unless during the progress of the work it is found better to substitute a mass of concrete for the piling under the floor. In the event that the Government decides to so modify the construction, the cost of the work as affected by it shall be determined and fixed by a board of civil engineers appointed for the purpose, upon a fair basis of prices, whose decision, upon approval by the Bureau of Yards and Docks, shall become binding.

"The engine, pump, and boiler house shall be one story, of brick with stone trimmings, and steel roof trusses covered with a slate roof.

"The culverts and pump well shall be of good hard-burned brick laid in cement mortar and concrete, as shown.

"The pumps, 3 in number, are to be of the centrifugal type, balanced, and driven by vertical high-pressure noncompound engines. The boilers are of steel, of the horizontal return tubular pattern, six in number.

"The caisson, a floating gate, is of boat form, constructed of steel, and fitted with engine, pump, and boiler.

"Tenders must be for the dry dock completed with pump well and culverts, caisson, pumps, boilers, and engines, with house, capstans, bollards, cofferdam, and other temporary works, and all parts of the works herein specified and any not enumerated which are necessary to render the dock complete.

"*Character and elevation of ground.*—Sections of the ground are shown by borings made upon the site by the Government, but it is desired that bidders make examinations for themselves, as the materials are very irregular in arrangement, and the Government does not guarantee that the borings made indicate the true character of the ground in the entire site. The levels show the general contour of the ground on the center line, but bidders are desired to make examination for themselves as to the amount of excavation and filling.

"*Mean high water.*—The mean high water referred to herein is that found by the tidal observations made at the station, and corresponds with 20 of the tide gauge, from which the bench mark is established.

"*Facilities for labor and materials.*—Persons intending to tender for this work are requested to visit and examine the locality and inform themselves in regard to materials and labor in the vicinity and the facilities for obtaining them.

38 "*General dimensions.*

Length on coping from head to outer end of table...	625 feet 3 inches.
Length on coping from head to outer gate.....	605 feet 9 inches.
Length on floor from head to inner abutment.....	529 feet 3 inches.
Width on coping at body	130 feet 1½ inches.
Width on coping at abutment.....	92 feet 7⅝ inches.
Width on floor in body	67 feet 1½ inches.
Depth from coping to mean high water.....	7 feet.
Depth from coping to floor in body	39 feet 3 inches.
Draught at mean high water over sill	30 feet.

"GENERAL CONSTRUCTION.

"*Excavation and grading.*—All earth excavated and not required for refilling or grading within the limits of structures is to be deposited within the limits of the station, at reasonable distances from the dock, where indicated by the commandant, not to exceed 1,000 feet from the dock, and brought up to the grade of the station as established.

"Materials dredged and deposited in scows may be disposed of by the contractor as he desires, provided no damage is done to the channel in

front of or leading to the station, and in accordance with the harbor regulations in relation thereto.

"Upon completion of the work the surface is to be evenly graded from coping back to the line of sheet piling and around the pump house, to correspond with the grade of the station adjoining, as the civil engineer or other officer in charge may direct.

"No excavation or dredging for the purpose of deepening the channel beyond the cofferdam of the dock shall be required of the contractors, unless for the removal of material deposited by them.

"*Piles.*—All piles are to be of Douglas fir, not less than twelve (12) inches in diameter at the butt and six (6) inches in diameter at the top, and of such lengths as may be required to drive to a firm bearing.

"All piles which are to be in contact with concrete or clay puddle must have the bark removed from such surfaces of contact.

"All piles in the bottom of the dock shall be accurately spaced and driven vertically until a satisfactory depth has been reached and the penetration is not more than one-quarter (¼) inch under the last blow of a hammer weighing three thousand (3,000) pounds, falling twenty-five (25) feet, or the equivalent thereof, unless the Bureau shall authorize a modification hereof after examinations and tests are made.

"All other piles shall be driven to a like firm bearing and until a penetration and a resistance are obtained which shall be to the satisfaction of the engineer in charge and in accordance with these specifications.

"Any piles broken or injured in driving shall be replaced.

"All piles are to be sound and straight.

"The spacing and number of the foundation piles, brace piles, crosscap piles, etc., shall be as shown on the drawings.

"Piles are to be shod with iron, if found necessary in the opinion of the engineer.

"No pile driving shall be accepted as satisfactory in the side construction work which does not secure a penetration of at least eighteen (18) feet, and if necessary the earth shall be first excavated sufficiently to give this limit of length when refilling is done.

"A less number than shown may be driven under the keelway if found impracticable to get all of them down to a satisfactory permanent bearing.

39 "Sheet piling is to be of sound Douglas fir, five (5) inches in thickness, about ten (10) inches wide, grooved and fitted with one and a quarter (1¼) inches by two (2) inches cedar tongues, and driven close, to depths shown or as required by the engineer in charge to make good work.

"At intersections of rows of sheet piling square piles twelve (12) inches by twelve (12) inches, properly grooved, are to be driven.

"The lines of sheet piling are to be as shown on the plans.

"The sheet piling in the bottom of the dock must be driven with special care to insure good and tight work, and to the depth shown, if possible.

"*Subdrains.*—After the piles in the dock bottom, inside the abutment floors, are driven and excavations made for the concrete, subdrains are to be made of two (2) inch plank, with inside dimensions of six (6) inches by six (6) inches, and laid both longitudinally and transversely in the positions shown. They are to be connected at all intersections.

The transverse subdrains are to be laid between every third and fourth transverse rows of piles. The longitudinal subdrains are to be laid between the longitudinal rows of piles where shown. The sides of the subdrains are to be perforated with three one and a half (1½) inch holes per lineal foot. All joints and intersections are to be well and carefully made. The longitudinal subdrains are to empty into the drains leading into the pump well and have flap valves at their outlets.

"The subdrains are to be filled around with small-sized broken stone or gravel. The concrete filling above is to entirely cover the subdrains.

"*Concrete.*—The heads of the foundation piles are to be surrounded by a continuous bed of concrete, three (3) feet least thickness, and extending up the sides in the body of the dock to the foot of the eighth altar, as shown.

"From the outer end of the table to the inner end of the inner abutment concrete of depths shown is to be laid.

"The bottom for a distance of six (6) feet beyond the table end is to be covered with a bed of concrete, sloped as shown.

"Drainage gutters three (3) feet wide, with a fall of twenty (20) inches toward tran'verse drain for under floor drainage, are to be formed as shown on the drawings.

"The concrete at tran'verse drain is to extend five (5) feet lower than in the body of the dock.

"All concrete is to be composed of one (1) part Portland cement, two (2) parts sand, and four (4) parts gravel, all by measure. It is believed that sufficient gravel of suitable size and quality can be obtained within the limits of the naval station. The contractor shall have the privilege of using from such of this gravel as the engineer in charge may decide to be in every way suitable. There may be substituted for it broken stone of approved quality, should the contractor prefer to furnish it. If, in the opinion of the engineer in charge, the gravel upon the station is not of proper quality to be used, to the exclusion of broken stone, then such proportions of gravel and broken stone shall be used as he may direct.

"The concrete shall be formed in the following manner: The sand and cement shall be thoroughly and evenly mixed dry on close platforms, after which water will be added untill the paste assumes a proper and uniform consisteney. This mortar will then be spread uniformly over the gravel, which shall have been previously thoroughly moistened and spread in an even layer upon the platform. The mass shall then be thoroughly mixed by being turned over three (3) times previous to being conveyed to the place of deposit.

"It shall be deposited in layers of not more than nine (9) inches in thickness, and thoroughly rammed until water appears upon the surface. The surface of each layer is to be thoroughly moistened before the succeeding layer is deposited upon it, and if it has been exposed long it must be dusted with neat cement after it has been watered.

"No concrete shall, under any circumstances, be deposited in place after it has commenced to set.

"When in place and rammed, all wheeling, working, or walking on it must be prevented until at least twelve hours after being deposited.

"All dirty or dusty stone or gravel is required to be screened or thoroughly washed before it can be used; otherwise it shall be rejected and must be removed from the work.

"The cement used must be Portland, with a tensile strength of not less than four hundred (400) pounds per square inch at the end of seven days, one (1) day in air and six (6) days in water. It must be delivered fresh and in good condition, and kept perfectly dry after delivery. It will be tested before use by the engineer in charge, kept dry, and blocked up if placed upon the ground.

"All concrete shall be mixed in the presence of an inspector, and the contractor or his agent shall give notice to the engineer when mixing is to be proceeded with. The engineer may reject any concrete mixed when such notice has not been given.

"*Stone masonry.*—The masonry of the dock is to be ashlar, in continuous courses of two feet rise, patent hammered on the face, six cuts to one inch, or sawed. If sawed, any roughness left by the saw must be removed by rubbing with grit or sandstone. Beds and joints are to be smoothly dressed to form ¼-inch joints. The whole is to be laid, bedded, and jointed in Portland cement mortar, made of one part of Portland cement and two parts clean, sharp sand, by measure; and all joints between the ashlar and the concrete backing are to be thoroughly filled with this mortar and grouted up at every course. The face joints are to be neatly pointed with Portland cement mortar made of one part Portland cement and one part clean, sharp sand, after being picked out to a depth of at least ½ inch; the mortar to be pressed well and securely into the joints and finished off with such tools as may be required.

"If the pointing is done in hot weather, shelter shall be provided to protect the masonry from the direct rays of the sun.

"The coping stones are to be not less than two feet in thickness, four feet wide, and not less than four feet in length, and are to have a smooth top surface. They are to be laid to break joints with the course below. The coping stones forming the top of the caisson meeting face must be of large size, accurately fitted, and secured by dowels. The coping stones are to be rounded on the upper edge to a radius of three inches.

"The meeting faces for the caisson formed by the quoins will be dressed perfectly true, so as to make perfectly water-tight joints with the caisson, and must be of the best quality of granite.

"There will be no joint in the angle where the seat and meeting face for the caisson meet, the stones being worked out to form the angle.

"Stones in the invert are to be cut and dressed to the full depth on planes at right angles to the surface of the intrados, unless otherwise shown.

"The ashlar must be of granite or sandstone, of quality approved by the engineer. All stones must be hard, clean, and free from seams and imperfections, and of good bed and build. They must be laid true on their natural beds, and without pinning.

"No masonry is to be laid on a concrete foundation until it has thoroughly set.

41 "The Portland cement must be of the same quality as that prescribed for use under the head of Concrete.

"The sand must be the best quality, clean and sharp.

"*Culverts.*—The culverts are to be constructed in accordance with the plans, of the best quality of concrete and sewer bricks. No soft bricks of any kind will be allowed.

"The brickwork will be laid in Portland cement mortar, made of one part Portland cement and three parts of clean, sharp sand. All joints will be thoroughly flushed, and the outer surface to be well cemented to prevent leakage.

"The Portland cement concrete to be of the same quality as that specified under the head of Concrete.

"The emptying culvert is to be of the cross section and length shown in the plans. It is to be constructed upon a foundation of Portland cement concrete of the dimensions shown, unless upon excavating it is found necessary to substitute a pile foundation, in which case it will rest upon the pile heads embedded in concrete. This culvert will be enlarged at the pump house to form a well, into which the suctions of the main and drainage pumps will enter.

"*Grating.*—Cast or wrought iron gratings are to be provided and set over the inlets to the emptying drain.

"*Dock floor.*—In the body of the dock the floor system will be formed as follows: Upon the piles, spaced as shown, will be fitted and secured longitudinal timber of Douglas fir, 12 x 12 inches. Upon these, running transversely, will be fitted and secured Douglas fir timbers, 14 x 16 inches, spaced as shown, generally four feet from center to center. Upon the transverse timbers the working floor of 3-inch Douglas fir will be laid with open joints. All of the traverse timbers are to be in one length.

"*Braces and cross caps.*—Brace timbers of Douglas fir, 10 x 14 inches, are to be secured to the tops of the piles driven in the sloping sides of the dock in the body with screw bolts, and bolted to the transverse timbers in the floor system and the cross caps, as shown.

"Cross-cap timbers of Douglas fir, 12 x 12 inches, will be fitted and bolted to the heads of the piles outside the coping on every transverse row.

"*Altars.*—Altar timbers of Douglas fir, of the form shown, are to be fitted and bolted to the brace timbers in the manner shown, forming altars of 11 inches rise and 9 inches tread, diminishing from the lower angles to the abutment.

"*Coping.*—A timber coping, of Douglas fir, formed of three timbers, arranged and bolted as shown, will be constructed and surround the body of the dock at the top of the altar system.

"*Diagonal ties.*—The tie timbers, 5 x 10 inches, shall be screw bolted to the cross caps, piles, and braces at every bent, as shown.

"*Slides.*—Slides for materials, from the coping to the floor, are to be constructed of oak, in the positions shown on the plans, the floor of the slide to be three inches thick.

"*Puddling.*—Clay puddle, of the best quality to be obtained in the vicinity, shall be thoroughly rammed down behind the altars, following closely the securing of the latter, in the best manner, and extending to a depth of at least two feet from the lower side of the braces, measured at right angles to the slope. The different layers shall be thoroughly incorporated. It shall be free from all surface soil, sods, roots, and stones.

"*Keel and bilge blocks.*—Keel blocks, bilge blocks, and bilge-
42 block slides are to be of oak. They will be spaced as shown on the plans, and properly fitted with racks, keys, pawls, slides, chains, etc., in the best manner.

"*Bollards.*—Twenty (20) bollards, or mooring piles, shall be supplied and fixed in place and surrounded by a bed of concrete flush with the grade, located as directed.

"*Capstans.*—The contractor shall furnish and set five (5) power capstans of proper size, to be set in a body of Portland cement concrete, with proper holding down bolts, located as directed.

"*Fastenings.*—All timbers, piles, planks, etc., shall be carefully fitted and secured in the very best manner to the satisfaction of the engineer, with the best quality of refined American iron bolts, spikes, etc., necessary to make strong and substantial connections.

"*Miscellaneous.*—The whole of the timber used in the dock works shall be of the best merchantable quality, sound and straight, free from shakes, splits, unsound knots, or any imperfections, and of the full lengths and dimensions either specified or required.

"The connection between the stone and concrete entrance work and the timber work in the body of the dock is to be made by means of an extension of the concrete in the abutments, and suitable iron tiebars, to embrace not less than three of the altar brace timbers. This work is to be thoroughly grouted, in addition, as the altars are laid up.

"*The boiler and pump house.*—The boiler and pump house shall be a brick structure, located as shown on the plans, and of the dimensions there stated. It will have stone trimmings. A brick chimney, of the dimensions shown, will be constructed and connected with the boiler plant as shown.

"The bricks are to be the best quality, red, hard burned, straight and uniform in size, and free from soft bricks.

"The best and most suitable are to be selected for the face work. The bricks in the house above the water table are to be well and solidly laid in mortar, made of fresh-burned lime and sand in the proportions of one of lime to three of sand, by measure. All brickwork below the top of the water table is to be laid in cement mortar composed of one part Portland cement and three parts sand. The brickwork of the chimney is to be laid in mortar composed of one part hydraulic cement and three parts of sand. The brickwork throughout is to be laid in the very best manner, all joints to be completely flushed and walls kept true. No part of the walls is to be carried up more than six feet in advance of the remainder, and when so carried up to be racked back. Bricks are to be clean and laid damp. Every fifth course is to be a heading course.

"The lime must be of the best quality afforded by the market in the vicinity of the works, freshly burnt lump, and must be slaked in a tight wooden box at least ten days before being used.

"The Portland cement must be of the same quality as that prescribed for use in the concrete.

"The hydraulic cement must be of the best quality, subject to test, and show a tensile strength of fifty (50) pounds per square inch on specimens set thirty (30) minutes in air and twenty-four (24) hours under water.

"The chimney will be lined for a height of fifty-four (54) feet with well-burnt fire bricks, of best quality, laid in best quality fire clay.

"The roof trusses will be of steel, of the form shown, and rest upon cast or wrought iron plates set for the purpose. The purlins will be of timber, secured as shown, and dressed. The sheathing to be of fir or
43 other suitable wood, as directed by the engineer, one and a half ($1\frac{1}{2}$) inches thick, and of the best quality; that portion over the engine room shall be not more than four (4) inches wide, tongued and grooved, closely laid, nailed to purlins, and dressed on the under side. It is to be laid on an angle, as directed, and properly oiled and shellacked. The portion over the boiler room is to be not more than eight (8) inches wide, tongued and grooved, dressed on under side, and painted. Upon this sheathing will be laid heavy roofing paper. The whole will be covered with the best quality of slate, of approved size, and uniform in color. Slates will be secured by galvanized nails, with a lap not less than three (3) inches. All flashing and counter flashing to be done with five (5) pound sheet lead. It will be capped with six (6) pound lead, fourteen (14) inches wide, clamped by galvanized iron clamps twelve (12) inches apart.

"The boiler room and engine rooms will have concrete floors, as shown, that in the engine room to have an elevated working floor covered with planks.

"The gallery in engine room is to be constructed according to the plans, having a wooden floor, iron-pipe railing, and iron stairway. The walls to be wainscoted four (4) feet in height from the gallery floor; the wainscoting to be of narrow selected wood, oiled and shellacked, to be finished with baseboard and rail. The remainder of the engine-room walls, above the gallery, is to be lathed and plastered, two coats well troweled.

"All the ironwork, and woodwork not otherwise specified, must be painted as directed by the engineer.

"Sashes will be one and three-quarter ($1\frac{3}{4}$) inches thick, hung in double box frames, all of No. 1 redwood, and glazed with double-thick American glass. Double doors will be two and one-quarter ($2\frac{1}{4}$) inches thick, and single doors one and three-quarter ($1\frac{3}{4}$) inches thick, all to be thoroughly framed, and made of No. 1 redwood. All hardware for doors, windows, ventilators, etc., must be of plain but substantial character, and approved of by the engineer.

"The gutters and down spouts are to be of copper, fourteen (14) ounces per square foot. Down spouts to be securely fastened to walls at intervals of about six (6) feet. All to be well locked, riveted, and soldered.

"The stone trimmings will be set in the walls where shown in the plan, and well and properly bedded in mortar. The beds and builds to be brought to plane surfaces, so as to make close joints. The exposed surfaces to be dressed six (6) cut.

"The entire building is to be erected complete in every respect, in the best manner, according to the general plan, notwithstanding any omissions in the drawings or specifications of any provisions necessary to secure this result."

III.

In compliance with the provisions of the seventh paragraph of the foregoing contract, and in manner and form as therein required, the following supplemental contracts were made from time to time during the progress of the work, the increased or diminished cost having been first ascertained and reduced to writing, as required by said seventh clause of the original contract, to wit:

On March 15, 1893, for the extension of the dock from 600 to 650 feet the sum of $23,771.32 additional being paid for the increased labor and material necessary to perform the same, and the time for the
44 completion of the contract extended for three and one-half months on account thereof.

On the 23d day of November, 1893, for the improvement in the strength and dryness of the pump room of the pump and boiler house, the sum of $6,982.20 additional being paid therefor.

On the 28th of December, 1893, for a change in the laying of the concrete immediately about and contiguous to the suction pipes of the drainage pumps in the pump room of the pump and boiler house, the sum of $17 additional being paid therefor.

On the 4th day of August, 1894, for the substitution of concrete for sheet piling along the sides of the floor and under the entrance works, and for the construction of wing walls to reenforce the transverse lines of the outer wall, etc., the sum of $16,000.27 being paid therefor.

On February 21, 1895, for increased facilities for cleaning out the back connections of the boilers to be erected in the boiler room of the pump and boiler house, the sum of $18 additional being paid therefor.

On the 28th of February, 1895, for additional protection to the outer end of the brick discharge culvert, the sum of $115 additional being paid therefor.

On the 24th day of August, 1895, to provide a means of draining the bottom of the pump house, the sum of $119 additional being paid therefor.

On the 30th day of September, 1895, to provide a means for protecting the top of the Bollard piles, the sum of $100 additional being paid therefor.

On the 11th day of November, 1895, for the placing of 1 inch of plaster on the walls of the upper floor to the bottom of the pump house, the sum of $410 additional being paid therefor.

On the 20th day of August, 1896, for the omission of the cast-iron grating on the floor of the pump house, the sum of $200 being deducted from the contract price on account of such omission.

Except as stated in this finding, no other or different contract or agreement was ever made concerning any work, labor, material, construction, or design in connection with this dry dock.

IV.

At the inception of the building of this dock certain standstone, known as Tenino sandstone, was submitted by the contractors to the defendants' civil engineer in charge of said work, and was by said engineer accepted as a suitable and proper stone for use in said dry dock, under that clause

of the specifications that "the ashlar must be of granite or sandstone of quality approved by the engineer." The claimants had submitted two such bids. The first of these, based on the use of sandstone, was much the lower and was accepted.

From the beginning of work under the contract until the 29th of August, 1894, when a large portion of the same had been completed, U. S. G. White, civil engineer, United States Navy, was the engineer in charge of the work on behalf of the Government. Shortly after the inception of work the claimants tendered to him a sample of sandstone which they stated they proposed to use in the ashlar of the dry dock. They at the same time offered to exhibit to said engineer the quarry from which said stone was taken. In pursuance of this offer said engineer, early in the spring of 1893, visited said quarry, which was situated at Tenino, in the State of Washington, in order to inspect the same and to learn therefrom whether its stone was suitable for use in the dry dock construction. He there found a quarry open from 300 to 400 feet along the ledge and faced about 40 feet in depth and equipped with proper appliances for taking the stone out and working it. He made a careful examination of the face and satisfied himself as to its uniformity and freedom from sand, mica, and clay pockets and pebbles or bowlders; noted the reaction of the stone under the channelers then in operation; visited the work where the stone was being sawed to dimensions, and noted the reaction under the saws; noted carefully the abrading power of the stone when used as a grindstone; took hand tools and tried the stone; examined unused blocks of the stone that had been exposed to the weather for a long time to detect any signs of disintegration or deterioration from such exposure; visited the boiler room of the works and examined the stone which was in use as lining to the furnaces under the boilers that supplied power for the works, and found no evidences of any breaking down or disintegration from the heat to which the stone had been and was being subjected; made numerous examinations with a glass magnifying 6 or 8 diameters, looking to the detection of any mica or other substances in its composition, and found none, the texture appearing uniform and good under the glass, and he subsequently made a test to determine the percentage of absorption.

As the result of this examination he approved the sandstone from the Tenino quarry and informed the claimants that the same would be accepted for all work under the contract.

Tenino sandstone had in fact been used as a lining in the fire box of the boilers at the Tenino quarry for some time; also in the piers of a bridge over the Chehalis River, on the Northern Pacific Railroad, where it was exposed to the action of salt water, and had been so for a number of years without deterioration, and had also been used with success in a number of buildings in western Washington and Portland, Oreg., some of them very high ones.

Shortly after this examination, to wit, on the 4th day of May, 1893, the claimants, relying upon the assurances thus given by the engineer that stone from the Tenino quarry was approved and would be accepted, entered into a contract with the owners of the quarry to furnish them from said quarry all of the sandstone required for the work.

Said contract is as follows:

Copy of contract with Tenino Stone Quarry Co.

This agreement made and entered into this 4th day of May, 1893, by and between the Tenino Stone Quarry Co., party of the first part, and Byron Barlow & Co., of Tacoma, Wash., parties of the second part,

Witnesseth, That the party of the first part covenants and agrees to furnish and deliver f. o. b. on wharf at the U. S. dry dock all of the sandstone required for the stone entrance of the U. S. dry dock, Puget Sound, Washington, according to drawings and schedules of courses, numbers, and sizes furnished by the parties of the second part, and which form a part of this contract, for the sum of forty (40 cts.) cents per cubic foot, and all of the stone for the boiler and pump house trimmings for the sum of fifty-five (55 cts.) cents per cubic foot.

It is further understood and agreed that the stone shall be Tenino bluestone of good, even, regular texture, of quality approved and acceptable to the civil engineer, U. S. Navy, in charge of construction, and that the stones shall be split or channeled to dimensions on two sides, as near as it is practicable to make them, and that the other sides and ends shall be channeled or split even and true so as to have not over 2″ projections to be cut off any squared size.

It is further covenanted and agreed that the delivery of the stone shall commence between April 15th and May 1st, 1893, and delivered from time to time as fast as needed by the parties of the second part, and the delivery completed on or before October 1st, 1893.

The parties of the second part covenant and agree to pay unto the party of the first part the sum of forty (40 cts.) cents per cubic foot for all stone for dock entrance and fifty-five (55 cts.) cents per cubic foot for all stone for boiler and pump house trimmings.

Payments of 90 per cent to be made monthly for all stone delivered the previous month upon acceptance, approval, and estimate of the civil engineer, U. S. Navy, in charge of construction, and as soon as payment is received therefor from the Government by the parties of the second part, and the remaining 10 per cent upon completion of the setting of the stonework and upon the approval and acceptance of the stone by the said civil engineer, U. S. Navy.

It is further covenanted and agreed that in case delay is caused to the parties of the second part on account of nondelivery of the stone, then the party of the first part shall pay to the parties of the second part the sum of twenty ($20\frac{00}{100}$) dollars per day for each and every day of such delay, and the parties of the second part shall have the right to retain in their hands, out of any money due to said party of the first part, a sufficient amount to cover the penalty for time delayed.

(Signed) TENINO STONE COMPANY.
By CHAS. A. BILLINGS.
GEO. N. VAN TINE.
S. W. FENTON.

BYRON BARLOW & CO.
BYRON BARLOW.
JAS. E. BLACKWELL.

46 Afterwards, and on the 28th day of June, 1893, they entered into a contract with Albert and Louis Beaudette, stonecutters, to cut the stones.

Thereafter a carload of stone was furnished by the owners of said quarry under their contract, which arrived at the site of the dock on or about the 20th of June, 1893. The amount of this stone, 2,377 cubic feet, at 65 cents per foot, $1,545.05, was included in the vouchers rendered by the claimants in the month of June, 1893, to which the following certificates were annexed:

"Having fully examined the labor and materials above charged, I certify that they are of good quality and in all respects in conformity with the written contract of date October 29, 1892.

"U. S. G. WHITE, *Civil Engineer, U. S. N.,*
"In ch'g of constr'n of dry dock."

"Received the above labor and materials in good order at Puget Sound Naval Station this 1st day July, 1893.

"U. S. G. WHITE, *Civil Engineer, U. S. N.,*
"In ch'ge of constr'n of dry dock."

"U. S. NAVY-YARD, PUGET SOUND NAVAL STATION,
"July 8th, 1893.

"Approved for the sum of fourteen thousand one hundred and thirty-one dollars and fifty-seven cents.

"JOHN C. MORONG, *Commandant."*

Said voucher was forwarded July 8, 1893, by the commandant at Puget Sound Naval Station, Lieut. Commander John C. Morong.

The item for stone was, however, stricken out of the voucher, at the Bureau of Yards and Docks, Navy Department, and the total amount of the voucher was thus reduced to the sum of $12,741.03.

This action of the Navy Department originated in the receipt by that Department of a communication from a labor organization, the Tacoma Trades Council, of the State of Washington, complaining of the quality of the stone.

The Department, upon receipt of this complaint, called upon the commandant of the Puget Sound Naval Station for a report on the quality of said stone. He in turn called for a report from the engineer in charge, who reported favorably on the quality of said stone, accompanying his report with letters from the chief engineer of the Northern Pacific Railroad and others acquainted with the use of said stone, and his report was adopted as his own by the commandant of the Puget Sound Naval Station and was forwarded to the Navy Department.

On the 14th of June, 1893, the claimants addressed the following letter to the commandant of the Puget Sound Naval Station:

"PORT ORCHARD, WASHINGTON, *June 14, 1893.*

"Lieut. Commander J. C. MORONG, U. S. N.,
"Commandant Puget Sound Naval Station, Washington.

"SIR: It having come to our knowledge that statements have been made against the use of Tenino sandstone in the entrance of the U. S. dry dock, we beg leave to submit the following:

"The questions to be considered in connection with selecting stone for

the dry dock are strength, durability, and dimensions, or sizes, of stones which can be obtained for the purposes intended.

"There can be no question to any unprejudiced, competent authority as to the strength being sufficient for the purpose in view.

"The extreme height of stonework resting on top of another stone is 39′ 6″, multiplied by the weight per cubic foot, 150 lbs. = 5,925 lbs. on square foot of stone. While there has been to our knowledge no authentic test of the crushing strength of Tenino sandstone, yet the strength of the weakest sandstone ever tested is 2,200 lbs. per square inch, and of common brickwork 500 to 1,000 lbs. per square inch.

"In our judgment the Tenino stone is similar in texture and strength to the well-known Amherst, Ohio, sandstone, which stands a test of 5,000 lbs. per sq. inch, but taking the strength of the lowest known, 2,000 lbs. per sq. in., × 144 sq. in. = 316,800 lbs. per square foot of strength, against a load of only 5,925 lbs. per square foot.

"*Durability.*—There has been no stone on this coast used long enough to state what its durability is. The Tenino stone has been used from 6 to 8 years, and in not one instance has it shown any deterioration from the action of the elements or from fire, and it is a well-known, indisputable fact that the stone hardens with age; besides anyone can see now for themselves where the Tenino stone has been in use for 18 months as a lining for the fire box for the boilers of the Tenino company instead of fire brick, and in not one place could we discover any cracks or disintegration from the heat.

47 "We know of no stone on this coast having been used in contact with salt water, and we have as good reason to think Tenino stone will withstand such action as well as any other untried stone.

"*Dimensions.*—The very large sizes of the stones for the dock entrance are very hard and expensive to get in any quarry, and in our examination of quarries the Tenino is the only one we felt any assurance that the sizes required could be obtained, or the quantity within the time needed.

"We feel sure that the charges against us and this stone are prompted by that spirit of boycotting now being resorted to so frequently by labor unions.

"The Seattle Stone Cutters' Association has repeatedly written us, telling us of their having enlarged the Seattle district in order to include the dry dock, and what prices and rules would govern here. We have not replied to such letters because we believe that we have a right, so long as we obey the laws of the land, to manage our own business to suit ourselves, and we do not think any association of men, outside of a legislative body, has any right or power to make rules to hamper or injure our business.

"The Tenino Stone Co. has received two blank contracts to sign, pledging themselves to sell no stone to contractors who would employ anyone except union stonecutters, which they refused to sign, hence these charges against the stone.

"Very respectfully,

"BYRON BARLOW & Co."

The Chief of the Bureau of Yards and Docks, on the 30th of June, 1893, wrote as follows to the commandant of the Puget Sound Naval Station:

"BUREAU OF YARDS AND DOCKS, NAVY DEPARTMENT,
"*Washington, D. C., June 30, 1893.*

"*To the Commandant, Puget Sound Naval Station, Washington:*

"SIR: * * * The Bureau desires to say now, however, that the selection of the quarries from which the stone is to be obtained can not be made by the contractors to restrict the Government officers to the acceptance of any sandstone of which they do not approve.

"Under the specifications the stone must be of quality approved by the engineer without regard to locality, and the contractor must select or open a quarry to furnish stone which will meet with such approval.

"If the contractor has exercised any other supposed right of selection under the contract, limiting the approval of the engineer to a sandstone from a particular quarry, it is one to which he is not entitled, and by which the engineer was not bound.

"The Bureau thinks that the sandstone for the dock should be one of the best to be obtained.

"In the further consideration of the matter the Bureau desires that it may be understood that it decides the contract and specifications to give to the engineer the decision as to the standard of quality, and he is fully authorized thereunder to fix upon the quality of sandstone he requires, by sample or otherwise, and require material equal to it.

"Very respectfully,

"N. H. FARQUHAR,
"*Chief of Bureau.*"

48 On the 21st of August, 1893, the claimants addressed the following letter to the engineer in charge:

"PORT ORCHARD, WASHINGTON,
August 21, 1893.

"Mr. U. S. G. WHITE,
"*Civil Engineer, U. S. Navy,*
"*In Charge Construction U. S. Dry Dock,*
"*Puget Sound Naval Station, Washington.*

"SIR: We enclose herewith our bill for sandstone, the payment of which has been neglected by the Government for two months.

"We have heard unofficially that there was some question about the acceptance of this stone (Tenino sandstone) by the Navy Department.

"We have had such confidence that this stone would finally be accepted that we have thought best not to annoy the Bureau for an immediate decision; but this has been hanging fire now for two months, and we think we are justified in demanding payment for same for the following reasons:

"Neither in the specifications or contract do we find any authority for the Bureau to pass any opinion on the quality of materials, except by the civil engineer.

"Paragraph 13 of page 5 of the specifications reads: 'The ashlar must be of granite or sandstone of quality approved by the engineer.'

"This clearly leaves the question of acceptance solely with the engineer in charge. Our bid accepted was for sandstone, which establishes the fact that the ashlar must be sandstone, approved by the engineer. To make sure that this stone was suitable, both as to quality and quantity

required, we had the engineer visit the quarry with us, and the stone was accepted by him.

"The specification makes the engineer the agent of the Government in this matter, and it is a well-known fact in common law that the agent binds the principal whether the Bureau sees fit to disapprove of the action of the engineer (its agent) and condemn the stone or not. This stone which has been delivered we claim is accepted by the Government and must be paid for. We make the bold assertion most positively that there is no other quarry in the State which can furnish the sandstone of the quality required and of the sizes shown on drawings, and there is no other quarry having the facilities, machinery, derricks, &c., capable of quarrying stones the sizes required.

"We think it also a great hardship, in view of the great stringency in money, both to us as well as the quarrymen, to withhold this payment so long solely on the complaint of stonecutters, disgruntled because we would not let them dictate terms, wages, etc., to us—in fact, let them run our business.

"It is also a great hardship to the stonecutters we have engaged, who have now been waiting here two months at expense, ready to begin cutting stone which is on the ground.

"The action of the Bureau will also delay us in finishing our contract within the time specified, and we now give notice we shall claim this delay.

"We desire also to inform you that the quarry has gotten out most of the stone required for the dock, and demands that we receive the same as provided in our contract with them; also that they will claim payment for said stone.

"We therefore must insist on immediate payment for said stone, and the Bureau's decision as to the remaining stone.

"Very respectfully,

"BYRON BARLOW & CO."

49 "AUG. 21.

"*N. H. Farquhar, Chief of Bureau of Yards and Docks, Navy Dept., to Byron Barlow & Co., Dr.*

"June 20. To 2,377 cubic ft. sandstone, at 65c ..... $1,545.05"

On the 31st day of August, 1893, the Chief of the Bureau of Yards and Docks announced by letter to the commandant of the Puget Sound Naval Station that the Tenino stone would not be accepted as material for construction, and on the 8th of September, 1893, the engineer in charge notified the claimants of this decision.

V.

On the 9th of September, 1893, the claimants wrote as follows to said engineer:

"PORT ORCHARD, WASHINGTON, *Sept. 9, 1893.*

"Mr. U. S. G. WHITE,

"*Civil Engineer, U. S. Navy,*

"*In Chg. Construction Puget Sound Dry Dock.*

"DEAR SIR: We beg leave to acknowledge the receipt of your letter of the 8th inst., notifying us of the rejection by the Bureau of Yards

and Docks of the Tenino sandstone offered by us to be used in the construction of the dock. In this connection, we beg leave to ask if you have had any official instructions to govern you in the inspection and approval of materials to be used in the construction—especially the stone—other than those contained in the specifications and contract.

"Very respectfully,

"BYRON BARLOW & CO."

Upon being notified by the Navy Department that the Tenino sandstone would not be accepted, the claimants—protesting against such requirement—offered stone from Sucia Island and also from Dog Fish Point, which was accepted and used in the construction of the dock.

Upon their tendering such stone to the civil engineer in charge, he wrote them under date of March 29, 1894:

"Messrs. BYRON BARLOW & CO.,

"*Charleston, Washington.*

"GENTLEMEN: The receipt of your favor of yesterday is acknowledged, and in reply would say that the stones referred to therein, having been approved by the Bureau, will be accepted by me, subject to inspection under such specifications as I may be furnished with by the Bureau.

"2. The specifications forming a part of your contract being of no effect under existing circumstances, I have asked for such specifications as will doubtless be furnished therewith before any stone will be delivered here.

"Very respectfully,

"U. S. G. WHITE,

"*Civil Engineer, U. S. Navy, in Charge of Construction.*"

VI.

When the attention of the Bureau of Yards and Docks was called to the alleged unfitness of this stone for the purposes required, the Navy Department, through the Chief of the Bureau of Yards and Docks, instituted an examination and inquiry for the purpose of determining the chemical ingredients, geological formation, the tensile
50 strength, the porosity, the crushing strength, and the absorbent qualities of the said Tenino sandstone, and to this end a number of experiments, tests, and observations were had at the bureau of medicine and hygiene at the Watertown Arsenal and at other scientific places by officers in charge of scientific institutions and persons skilled and learned in their respective professions, with the result that said Navy Department, through the Chief of the Bureau of Yards and Docks, reached the conclusion that said Tenino sandstone was not fit and suitable for the purposes to which it was proposed to use said stone; that said stone did not fulfill the requirements of the contract and specifications as above recited; that it was not a hard stone, nor a clean stone, nor free from imperfections; that its absorbent qualities were too high; that its crushing strength was too low, and that it was in many essential particulars totally unfit and unsuitable and undesirable for the use in the ashlar of this dry dock; and thereupon, to wit, on the 29th day of August, 1894, the contractors were notified of this decision of the Bureau

of Yards and Docks and were required to furnish other and better sandstone. From this decision of the Chief of the Bureau of Yards and Docks the claimants appealed to the Secretary of the Navy, who concurred in the opinion of the said Chief of the Bureau of Yards and Docks, and concurred in his order requiring a different and better sandstone. The tests and analyses of said Tenino sandstone were made from samples furnished to the Bureau of Yards and Docks by the contractors and by the commandant of the Puget Sound station. The delay in arriving at the ultimate determination to require a better quality of sandstone, which was reached on the 24th of August, 1894, was partly caused by the fact that the claimants were in correspondence with the Secretary of the Navy in an endeavor to persuade him to accept said Tenino sandstone. The tests and analyses of said stone, as above recited, were made promptly.

VII.

The amount of Tenino sandstone quarried, cut, and delivered was 2,349 cubic feet, amounting, at 65 cents a cubic foot, to $1,526.85.

The claimants had also, before receiving notice of the rejection of the Tenino sandstone by the Bureau of Yards and Docks, caused to be quarried and cut, but not transported, 7,280 cubic feet, amounting, at 65 cents a foot, less the cost of transportation, 10½ cents a foot, 54½ cents a foot, to $3,967.60, making a total for stone actually quarried and cut, and part of which was delivered, of $5,494.45. That sum, however, has not been paid by the claimants to the owners of the said Tenino stone quarry, nor does it appear that any action or suit has ever been brought against the said claimants for said sum of money.

The total amount expended by the claimants for furnishing, delivering, and cutting the stone which actually went into the construction of said dry dock from Sucia Island and Dog Fish Point, as aforesaid, was $33,556.23.

If they had been allowed to furnish Tenino stone they could have done so at a cost of $17,948.80. The additional cost, therefore, to the claimants of furnishing the stone which they did furnish, over and above what it would have cost them to furnish the Tenino stone, is the difference between the two sums last named, amounting to $15,607.43.

VIII.

The plans for the foundations of the boilers and boiler house were submitted to the civil engineer in charge of the work and approved by him, and the work was then done on said foundations in accordance
51 with the directions of said engineer. The foundation for the boiler house was completed and accepted by said engineer and included in his monthly estimate and paid for. The foundations for the boilers were made in accordance with the drawings so submitted to said engineer, and were completely laid at about the time the engineer first in charge of said work was detached therefrom. Subsequently another engineer was placed in charge of the work. In his opinion the foundations were imperfect and insecure because of defective construction on the part of the claimants and he required that they be relaid. The

claimants, protesting that it was not competent to require them to change the foundations after they had laid the same to the acceptance of the engineer in charge at the time of the original construction, relaid the same in accordance with the direction of the engineer thus subsequently in charge. The matter was subsequently referred to the Chief of the Bureau of Yards and Docks, and he decided that the work was required to be done by the terms of the contract. It does not appear that the claimants appealed to the Chief of the Bureau before doing the work, or that it was ordered by him.

The total additional cost of said work to the claimants was—

For the extra foundations for the boiler house.....	$312.12
And for the extra foundations for the boilers.....	384.56
Making a total of.....	696.68

IX.

In the execution of the contract the claimants drove a line of sheet piling transversely across the brick discharge culvert at the end of the brick work. They then went on and drove the round piling forming the foundations for the brick work of the discharge culvert. In cutting off this round piling, however, they made a mistake and cut the piling off 32 inches below the point where it should have been. As soon as this error was discovered they reported it to the engineer, and suggested two methods of remedying the mistake. One was to start the brick work 32 inches lower than it was originally shown, and to carry up the excess of height of 32 inches in brick work. The other remedy was to build up with timbers on top of the piles according to the height where they had been cut off too low, and then start the brick work on top of the additional 32 inches of timber work. The Department accepted the latter plan and also required that they put in a concrete toe to prevent the teredo from attacking the sheet piling and timber work. The claimants put in the timber work as required, and made no charge for the same. They also put in a concrete toe, as required by the Navy Department. This concrete toe had no relation to the error which had been made in the original construction of the sheet piling, but would have been required irrespectively of any such error having been made. The additional cost to the contractors amounted to $59.35.

X.

In refilling the dirt after the altars were in place no part of the filling was rammed or sluiced except the clay puddling. This was in accordance with the instructions of the engineer in charge of the work. The claimants discussed the matter with him, and he informed them that it was not required to be rammed or sluiced. He embraced the work done in that way in his monthly estimates, and the claimants received
52 payment for a large portion of the work done in that way at the contract rate of "Filling and grading per cubic yard, 30 cents." In the latter part of August, 1894, however, there was a change in the office of engineer in charge of the work for the United States. The new

engineer then placed in charge required the claimants to ram or sluice all back fillings. The claimants protested, insisting that the contract did not require anything more than depositing the material and evenly grading the surface to correspond with the grade of the station. The new engineer, however, required all the work to be thoroughly sluiced with water, and all but a small part thoroughly rammed, and the claimants did the work in that way under protest.

The additional cost to the claimants of doing this work, over and above what would have been required had they not been required to ram or sluice the same, would be 10 cents a yard, making, for 37,227 yards, $3,722.70. The engineer who ordered the work to be done in the manner stated referred the question of so requiring it at the request of the claimants to the Chief of the Bureau of Yards and Docks, and the latter informed said engineer that the Department approved his requirement, for the reason, as shown by the Bureau, that the contract plainly required it.

XI.

During the progress of this work it was discovered that the soil at the bottom of the dock was of a very tenacious and unyielding character, so as to be difficult of penetration for piles driven by the ordinary drop-hammer process, and was so reported by the contractors. On the 15th of February, 1894, it was stated that the round piles which were then being driven penetrated to a depth of from 8 to 10 feet. It was stated by the Bureau of Yards and Docks, on February 27, 1894, in answer to this statement, that while round piles penetrating from 8 to 10 feet, as now stated, may be satisfactory, depending upon the resistance shown by the first blow, yet the Bureau thought that these piles should be driven to a depth of 15 feet below the bottom of the excavation, if possible. A copy of this letter was furnished to the contractors, but when the report for piles driven in February was received it was found that the average of 76 piles driven on the 15th of February was 5 feet 0.77 inch, none going to 8 feet, and of the 57 piles driven on the 16th the average was 5 feet 0.60 inch, none going to 8 feet; and the average depth of the 891 piles driven in February was only 6 feet 0.82 inch. The general average for February was much reduced by the piles driven in the latter half of the month, after the attention of the contractors, as well as the civil engineer, had been called to the unsatisfactory depth reached by these piles. This report called forth from the Bureau other letters in March and April urging that the piles be driven to a greater depth and reiterating the instructions contained in the Bureau's letter of February 27. There was no claim made at this time by the contractors that they could not reach a greater depth than that hitherto reported. Thereupon the Bureau telegraphed definite instructions on the 13th of April to accept no piles driven to a less depth than 15 feet. The contractors made no attempt to show that they could not drive piles to that depth or to a greater depth than had been obtained, but employed experts to give an opinion after tests upon the piles driven to show that the Bureau was wrong. In view of these facts, the Secretary of the Navy, on the 21st day of May, 1894, and upon the occasion of a visit to said dock by that official, verbally authorized and directed the contractors to sink

the piles by a method known as the water-jet system; that is to say, by forcing water into the ground by means of a sink pipe operated by the hydraulic system, thus forming a hole into which the pile is set.

53 The contractors objected to and protested against this method of driving the piles upon the ground that it destroyed and weakened the bottom of the pit, and subsequently a board of naval experts was convened for the purpose of reporting upon the advisability of sinking the piles by this system. The board reported adversely to this system, and recommended that the piles be driven in accordance with the provisions of the contract and by the ordinary drop-hammer process, the piles to be driven to a minimum of 6 feet. The remaining 696 piles, which were driven after this report by the drop-hammer process, reached an average depth of 10 feet 4 inches. The aforesaid board of naval experts, under the direction of the Secretary of the Navy, passed upon the expense to which the contractors had been put on account of this verbal order of the Secretary of the Navy to the contractors, requiring them to sink said piles by said water-jet system, and recommended an allowance to said contractors therefor in the sum of $1,156.76. The amount thus recommended by this board of engineers was approved by the Secretary of the Navy and a voucher therefor was drawn, but when the same came before the Auditor for the Navy Department for audit and before the Comptroller of the Treasury for payment, it was refused, upon the ground that the services required were not extra and additional, but that they were such as the contract contemplated, and upon the further ground that the Secretary of the Navy, under the specific requirements of section 7 of the original contract, had no power or authority to authorize or direct the incurring of this expense unless the cost of the same was first ascertained by a board of officers provided for that purpose before the expense was incurred, and reduced to writing, as required by the seventh clause of the contract. Whereupon the Secretary of the Navy procured the reference of this item to this court under and pursuant to the provisions of Revised Statutes, section 1063.

The reasonable value of the work set forth and described in this finding is $1,156.76.

XII.

The delay incident to the experimentation with the water jet in driving piles, as stated in the last finding, extended from April 13, 1894, to July 5, 1894, a period of seventy days, exclusive of Sundays. The expense caused to the claimants by the defendants' officers in the suspension of the work was $2,625.

The board named in the last finding reported in regard to the claim for these expenses as follows:

"The board is of the opinion that the contractors are equitably entitled to a reasonable compensation for any additional expense incurred by them in the prosecution of the work in consequence of unusual delays that may be found to have been caused by the Government, but having no means of verifying the claim submitted for such additional compensation the board is unable to properly consider this question."

CONCLUSIONS OF LAW.

The court, upon the foregoing findings of fact, decides as conclusions of law.

I.

The claimants should recover upon the subject-matters set forth in Findings VII, IX, XI, and XII the sum of $24,942.99.

II.

The claimants should not recover upon the subject-matters set forth in Findings VIII and X.

54 VIII.—*Opinion of the court.*—Delivered May 21, 1900.

NOTT, Ch. J., delivered the opinion of the court:

The contract in this case, bearing date the 29th of October, 1892, provides "that if at any time it should be found advantageous or necessary to make any change or modification in the aforesaid plans and specifications, such changes or modifications must be agreed upon in writing." The parties acted under this provision no less than eleven times. There are eleven supplemental contracts, in one of which the trivial sum of $17 is the total consideration.

The defendants now contend that the claimants can not recover upon some of their causes of action because this provision of the contract was not complied with. It is manifest, however, that neither of the parties to the contract considered the provision as applicable to most of the matters now in issue. The Chief of the Bureau of Yards and Docks certainly did not. He did not seek to make any change or modification in the "aforesaid plans and specifications" which would involve additional expense. On the contrary, he regarded everything that was done under his direction and requirements as an obligation resting upon the contractors under the original contract. The one party maintained that the contractors were bound by the contract; the other party maintained that they were doing extra work or furnishing better material under requirements which were not contained in the contract.

The contract also provides that "no omission in the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractors. And all claims for extra compensation by reason of, or for, or on account of, such extra performance are hereby in consideration of the premises expressly waived."

To the court it seems plain that this provision applies only to "omissions," to matters of "detail," and only to such "omissions" and "matters of detail" as shall be "necessary to carry the contract into full and complete effect, in accordance with the true intent and meaning thereof." It can not be held, in the opinion of the court, that the things which the Chief of the Bureau compelled the contractors to do were "omissions" on "matters of detail," or "necessary" to carry the contract into

effect. On the contrary, they were clearly changes or additions which the Chief of the Bureau had or had not the right to require within the true intent and meaning of other provisions of the contract.

The contract also provides "that if any doubts or disputes arise as to the meaning or requirements of anything in this contract, or if any discrepancy occurs between the aforesaid plans and specifications and this contract, the matter shall be at once referred for the consideration and decision of the Chief of the Bureau of Yards and Docks, and his decision thereon shall be final, subject, however, to the right of the contractors to appeal from such decision to the Secretary of the Navy, who, in case of such appeal, shall be furnished by the contractors with a full and complete statement of the grounds of their appeal, in writing, and shall thereupon take such action in the premises as, in his judg-
55 ment, the rights and interests of the respective parties to this contract shall require, and the parties of the first part hereby bind themselves and their heirs and assigns, and their personal and legal representative, to abide by his, the said Secretary's decision in the premises."

But here it must be noted that this fourteenth provision of the contract is grounded upon "doubts and disputes," which are to be at once referred for the consideration of the Chief of the Bureau, whose decision is to be final unless appealed from to the Secretary. The doubts and disputes are manifestly those which might arise between the contractors and the engineer in charge. In other words, the contract provided that before the provision should become practically binding, it would be necessary that the engineer in charge, the Chief of the Bureau, and the Secretary of the Navy should all decide against the contractors, and that two of the three should be disinterested. As regards some of the matters in controversy there was no "doubt" or "dispute" on the part of the engineer in charge—his decision was on the side of the contractors—the controversy was begun by the Chief of the Bureau.

If the full intent and effect be given to this provision which the defendants now ascribe to it, the contractors might as well have written an agreement on half of a sheet of paper, binding themselves to perform whatever work and furnish whatever material the Chief of the Bureau might require, and accept therefor whatever remuneration the Secretary of the Treasury might be pleased to give them.

In Douglas's Case (2 C. Cls. R., 347), this court said "there are agreements to abide by the decision of a third person, reciprocally obligatory upon both the parties, which are always to be upheld—as an agreement that wagons to be manufactured shall be examined and approved by a certain inspector (Albert Brown's Case, 1 C. Cls. R., 307), or that the title to an estate to be conveyed shall be approved by the Attorney-General (Merchant's Exchange Company's Case, Ib. R., 332), but a decision under this contract by the referee, made after the contract has expired, and when the rights of the parties had become settled and fixed thereunder, can not preclude them from appealing to a court of justice. In Hurts v. Litchfield (39 N. Y. R.), where a contract provided that "in case any question arises under such contract in relation to the work, both as to value of work added or deducted, the same shall be adjusted by the architect," the court of appeals held that the provision was not

binding, being against the policy of the common law and having a tendency to exclude the jurisdiction of the courts, provided with ampler means to entertain and decide legal controversies." The court also said that such stipulations "do not deprive the party of his action, either at law or in equity to enforce his rights." Many cases are cited, English and American. The court of appeals recognized as valid such stipulations as have always been upheld in this court, cases "where an agreement makes the procurement of one architect's certificate a condition precedent to any right of action; then," says the court, "the rule is as claimed by the defendant in this case, but such is not the agreement between these parties."

In the many cases in which it has been held that where a contract provides that the architect or the engineer in charge shall determine the quantity or the fitness of the material or the sufficiency of the work his decision is ordinarily final, it has been the reference of a matter of fact to the arbitrament of a person peculiarly fitted by his own knowledge concerning the subject of dispute to determine a simple fact. But since the decision of the Supreme Court in Clark's Case (6 Wall. R.,
56 543) it has never been supposed that even the engineer's system of measurement was conclusive of the contractor's rights. Collins and Farwell (34 C. Cls. R., 294). In the cases of all building contracts there are matters to be determined as the work progresses. Some one must pass upon the fitness of the material, the sufficiency of the workmanship, the amount of work performed, etc. These are matters which can not be left until a building is completed; it is for the interest of both parties that they be settled as the work proceeds. The architect or engineer in charge being the person most familiar with the work and professionally fitted to pass upon such questions is ordinarily designated as the referee or arbitrator to determine them. Such agreements for such arbitraments must be upheld. But the agreement now under consideration is a very different thing. It goes far beyond anything that has come before the court since the case of Douglas, for it sets up the Secretary of the Navy, having no personal knowledge of the matter in dispute, as being in effect an appellate court of justice—the court of last resort. It in effect binds one party to abide as to every matter of fact, and as to every question of legal right, by the decision of the other party. Lord Coke said centuries ago that it becomes no man to be both judge and party in the same case.

Certain statutes have been interposed as a defense (Rev. Stat., secs. 3744, 3697, 3722, 3733). Some of these are mandatory; some merely directory. In Clark v. United States (95 U. S. R., 539) the Supreme Court held that the statute which requires contracts to be reduced to writing is mandatory, but at the same time expressly held that "where, however, a parol contract has been wholly or partly executed on one side, the party performing will be entitled to recover the fair value of his property or service as upon an implied contract for a quantum meruit." The Supreme Court also held about the same time that "the principal's which govern inquiries as to the conduct of individuals in respect to their contracts are equally applicable where the United States are a party," and that where an individual contractor would be liable for having ordered the suspension of the work, "the United States must answer

accordingly to the same rule." United States v. Smith (94 U. S. R., 214–217). In Semmes & Barbour (26 C. Cls. R., 119), sections 3679 and 3732 of the Revised Statutes were interposed as a defense, and there was also a statute relied upon which forbade contracts to be made for buildings "to be used for the purposes of the Government in the District of Columbia;" but the court held that these provisions of law "undoubtedly applied to express contracts," and "have no application to that class of implied contracts which arise from acts of public officers in the performance of their duties in carrying on the business of the Government." In many cases it has been held that though Congress may limit the expenditure to the amount appropriated, the contractor "is bound to know the condition of the appropriation account at the Treasury." (Myerle's Case, 33 C. Cls. R., 1, and cases cited.)

In the case now before us it was also supposed by the accounting officers that the provisions of the contract requiring new or additional work to be ordered in writing, bound the Secretary of the Navy, himself, and that he could neither order such work to be done in any other way than that provided by the contract, nor pay for it when it had been done.

As such provisions in contracts are constantly causing disputes and controversies, we now formulate the principles governing them, which we regard as well settled:

57 1. Where additional work or better material than the contract requires was ordered by a subordinate officer having no such authority, the compliance of the contractor must be regarded as voluntary service, and no contract can be implied, even though the defendants acquired a benefit by the change; that is to say, the Government can not thus be compelled to build a better building than was intended by its responsible contracting officer. (Driscoll's Case, 34 C. Cls. R., 508, and cases cited, p. 524.)

2. Where, on the contrary, the alterations or additions were ordered by an officer clothed with responsibility and authority to contract, a contract will be implied to the extent of the benefit which the defendants have received, and the claimant will recover in quantum meruit. (Hawkins v. United States, 96 U. S. R., 689.)

3. Where a contract expressly provides that alterations or additions must be ordered in writing, and the cost be agreed upon before the work be done, the principals to the contract in ordinary cases between individuals may waive the requirement; so in the case of Government contracts, the officer who has authority to order or agree in writing must be considered pro hac vice as the principal, and if he orders a change orally, and the contractor acts on the order and performs the extra work, the parties will be deemed to have mutually waived the requirement. (Ford's Case, 17 C. Cls. R., 75.)

In a few words, it may be said that the statutes and these contractual provisions must be construed for the protection of the Government and not for the embarrassment of contractors; and that they can not be used by public officers to cloak breaches of contract or justify improper interference with the work, or to acquire in any way an unfair advantage over the other party. It is for the interest of the Government that its good faith and business responsibility shall be upheld. A policy which

precludes legal redress will drive every prudent and responsible contractor out of the field of competition.

The principal item in controversy is for the sandstone of which the dock was constructed. The specifications, which are a part of the contract and upon which the claimants predicated their bid, provide: "The ashlar must be of granite or sandstone of quality approved by the engineer. All stone must be hard, clean, and free from seams and imperfections, and of good bed and build." Two bids were submitted by the claimants, one for granite and one for sandstone. The defendants' officers accepted the bid for sandstone. The claimants then tendered a sample of the stone and the engineer in charge examined it and visited the quarry from which it was taken. He made a careful examination and satisfied himself as to the quality of the stone, its uniformity, its freedom from sand and mica pockets, from pebbles and boulders; he noted the reaction of the stone under channelers then in operation; he visited the works where the stone was being sawed and noted the reaction under the saw; he examined unused blocks of stone which had been exposed to the weather for a long time, and he examined it in many other ways. After these tests and examinations the engineer approved the stone so tendered by the claimants, which was known as the "Tenino stone," and informed the claimants that it would be accepted for all work under the contract. The claimants thereupon proceeded to contract with the owners of the quarry for that stone, and the owners of the quarry proceeded to excavate and deliver stone. A carload was furnished and delivered at the site of the dock, consisting of 2,377 cubic feet, which was accepted by the engineer in charge and the usual voucher for payment given,
58 to wit: That it was "of good quality and in all respects in conformity with the written contract." The voucher was approved by the commandant of the navy-yard.

Before this voucher was paid an organization known as the "Tacoma Trades Council of the State of Washington" complained to the Navy Department of the bad quality of the stone. It is asserted by the claimants that this was a malicious act, in retaliation for the refusal of the claimants and the owners of the quarry to employ union labor. With this charge the court has nothing to do; the "Tacoma Trades Council" is not now on trial. But any person has a right to lodge a complaint with the proper authorities where there is a public work that is not being properly carried out, and the executive authorities in charge of the work would be wanting in vigilance if they did not look into the complaint.

In this case the Chief of the Bureau did examine the stone which the claimants furnished, and he caused tests to be made more or less satisfactory to himself; and he examined stone from other quarries, and he decided to reject the stone which the claimants had agreed to furnish, and compelled them to procure stone from another quarry, which he designated, at a greatly increased price. The claimants, after protesting and appealing to the Secretary of the Navy, who affirmed the decision of the Chief of the Bureau, complied with the requirement. They seek to recover the additional cost which they were subjected to by this action of the Department.

On the part of the defendants it is said that by the fourteenth paragraph of the contract the claimants bound themselves to abide in all cases

of doubts or disputes by the decision of the Chief of the Bureau, subject only to an appeal to the Secretary of the Navy, and that the contract also provided that the work to be done under it should be entirely satisfactory to the Chief of the Bureau. It is true that the Chief of the Bureau was the contracting officer, and it is true that it was his duty to secure a public work of the best character. It is also true that if he found that the work which had been done was not going to secure all that was needed or intended for the public welfare, it was his duty to have the work done over again. But it is also true that when he invited bids he described to the bidders the work which they should do and the materials which they should furnish, and among other things he told them that the stone which they should furnish should be subject to the approval of the engineer whom he might select to be the agent of the Government in charge of the work. He imposed no other condition. Furthermore, it is also true that he made that proposition a part of the contract, and that he allowed the engineer in charge to examine the quarry and select the stone, and notify the claimants that this stone was accepted and approved, who consequently, on the faith of the approval, proceeded to bind themselves to their subcontractors, the owners of the quarry, for the procurement of the stone, and he allowed the parties to proceed to excavate and prepare and deliver stone. Finally, it is also true that he, and not the engineer in charge, rejected the stone; and that he, and not the engineer in charge, selected the other stone which the claimants were required to furnish. In a word, he departed from the terms of the contract both positively and negatively by himself deciding a question which it was agreed another person should decide, and by not carrying out that which the engineer in charge (who was on the ground, and could give his personal investigation to the stone and the quarry from which it was taken, and the works and edifices in which it had been tested by actual use) had in effect been determined. To hold that the Chief of the Bureau
59 could do this would be to hold that he could tear the contract to pieces at any time during the performance of the work and require the work to be done according to a contract into which the parties had never entered. The Chief of the Bureau did right in making changes conducive to the public interest, but he could not make these changes at the cost of the other contracting party. On the 30th of June, 1893, he decided "that this sandstone for the dock should be out of the best to be obtained." That may have been a judicious and necessary decision, and it is not for the court to question it, but the best sandstone which could be obtained was not the stone prescribed by the contract.

The court does not intend to pass upon the issue whether the one stone was better than the other, or whether either or both were sufficient for the uses and purposes to which the stone might be put. It is incontrovertible that either the engineer in charge or the Chief of the Bureau was the person to determine this question, and the resulting question as to which was the proper person is one of law. In the absence of fraud, collusion, or gross mistake the decision of the proper arbitrator was final and conclusive. There is no fraud or collusion in the case, and the court is entirely satisfied that the engineer in charge acted with due care and caution, and that his decision was the exercise of his best judgment.

The contracts between the claimants and their subcontractors have

been brought into the case by both parties, and the defendants rely upon them as being to some extent a defense to the claimants' demand for damages.

But since the decision in the leading American case of Masterton v. Mayor of Brooklyn (7 Hill N. Y. R., 61), it has been held generally and also by this court that such subcontracts can not "be taken into the account, or become the subject-matter of consideration at all in settling the amount of damages to be recovered for a breach of the principal contract." The defendants certainly were not a party to them, and can neither be injured by them nor obtain an advantage from them. The rule for the measure of damages for breach of contract in such cases, where the contractor is not allowed to perform according to the terms of the contract, is too well settled to be either questioned or discussed.

The causes of action set forth in Findings VII, IX, XI, and XII are sufficient, in the opinion of the court, to entitle the claimants to recover. As to the causes of action set forth in Findings VIII and X, the court is of the opinion that the claimants should have submitted the requirements of the engineer in charge to the Chief of the Bureau before proceeding with the work. They were required to do so by the terms of the contract, and authority to compel them to do additional work was thereby reserved to the Chief of the Bureau.

The judgment of the court is that the claimants recover of the defendants $24,942.99.

60 IX. *Final judgment.*—Entered May 21, 1900.

At a Court of Claims held in the city of Washington, D. C., on the 21st day of May, A. D. 1900, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Byron Barlow, James E. Blackwell, and James M. Dougan do have and recover of and from the United States the sum of twenty-four thousand nine hundred and forty-two dollars and ninety-nine cents ($24,942.99).

By the Court.

61 X. *Defendants' application for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 21st day of May, 1900, in favor of the claimants, the defendants, by their Attorney-General, on the 11th day of June, 1900, make application for, and give notice of, an appeal to the Supreme Court of the United States.

L. A. Pradt,
Assistant Attorney-General.

Filed and allowed in open court June 11, 1900.

62 XI. *Claimants' application for, and allowance of, cross-appeal.*

The United States having appealed from the judgment rendered in favor of these claimants on the 21st day of May, in the year 1900, for the sum of twenty-four thousand nine hundred and forty-two dollars and

ninety-nine cents ($24,942.99), now come the claimants, Byron Barlow, James E. Blackwell, and James M. Dougan, partners doing business under the firm name and style of Byron Barlow & Co., and hereby appeal to the Supreme Court of the United States from so much of said judgment as disallows the amounts stated in findings of fact VIII and X, as shown in conclusion of law 11.

GEORGE A. KING,
Attorney for Claimants.

Filed and allowed in open court June 11, 1900.

63 XII. In the Court of Claims.

BYRON BARLOW & Co.
vs.
THE UNITED STATES. } Nos. 20, 698, and 50, Department.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusions of law thereon, of the opinion of the court, of the judgment of the court, of the application of the defendants for and the allowance of an appeal to the Supreme Court of the United States, of the application of the claimants for and the allowance of a cross-appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this 17th day of July, 1900.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

64 (Indorsement on cover:) File No. 17861. Court of Claims. Term No. 376. The United States, appellant, vs. Byron Barlow, James E. Blackwell, and James M. Dougan, partners, as Byron Barlow & Co. File No. 17862. Term No. 377. Byron Barlow, James E. Blackwell, and James M. Dougan, partners, as Byron Barlow & Co., appellants, vs. The United States. Filed August 4th, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANTS,
v.
BYRON BARLOW, JAMES E. BLACKWELL, and James M. Dougan, partners, as Byron Barlow & Co. — No. 127.

BYRON BARLOW, JAMES E. BLACKWELL, and James M. Dougan, partners, as Byron Barlow & Co., appellants,
v.
THE UNITED STATES. — No. 128.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

Appellants in case No. 127.
Appellees in case No. 128.

STATEMENT.

These are cross appeals from judgments of the Court of Claims growing out of a certain contract in writing for the construction of a dry dock at Port Orchard, Wash., and also for compensation for expenses incurred and loss of time in and about the experimentation with a certain system of pile driving known as

the "water-jet" system, under verbal authorization and direction of the Secretary of the Navy during the progress of the construction of the dock. The action upon the written contract for the construction of the dock is for alleged breach of contract on the part of the United States in requiring the contractors to furnish a different and better sandstone for the ashlar of said dock than that required by the contract, as construed by the appellees, and for requiring the contractors to perform other work and supply other materials which the contractors claim were not required by the terms of the written contract. This action was brought by voluntary petition under the original jurisdiction of the Court of Claims. (Transcript, p. 8.)

The second cause of action was referred to the Court of Claims by the Secretary of the Navy under the provisions of section 2 of the act of March 3, 1883 (22 Stats., 485), commonly called the Bowman Act. The two causes were consolidated and were heard together (transcript, p. 15), resulting in a judgment for the claimants in the sum of $24,942.99 upon the findings of the court Nos. VII, IX, XI, and XII, and a judgment in favor of the United States upon the findings of the court Nos. VIII and X. From the judgments thus rendered in favor of the claimants the United States have appealed, and from the judgments rendered in favor of the United States the claimants have appealed.

Inasmuch as the nature of this case will necessitate its consideration by items, in which the facts relating to each item will necessarily have to be set forth in full, a detailed statement of the facts is omitted at this

point in the interests of perspicuity and in order to prevent repetition.

ASSIGNMENTS OF ERROR.

In case No. 127.

The court below erred:

1. In holding that the contract in the case at bar authorized the civil engineer in charge of the construction of the dry dock to designate the sandstone to be used in the ashlar of said dry dock, and in holding that his decision upon this issue was final.

2. In holding that the chief of the Bureau of Yards and Docks was not, subject to the right of appeal to the Secretary of the Navy, the proper person to designate the character of sandstone to be used in the ashlar of said dry dock, under the provisions of the contract at bar, and that his decision on said issue was not, in the absence of appeal to the Secretary, final.

3. In holding that the character of sandstone to be used in the ashlar of said dry dock was not such a "doubt or dispute" as to the meaning or requirement of the contract at bar as to necessitate a reference to the ultimate and final decision of the chief of the Bureau of Yards and Docks, subject to appeal to the Secretary of the Navy, whose decision should be binding upon both parties to the contract, as was required by the provisions of section 14 of said contract.

4. In holding that the provisions of section 14 of the contract at bar were void and of no effect, and in refusing to enforce the provisions of said section 14 according to its terms.

5. In entertaining jurisdiction over the cause of action disclosed in Findings VI, VII, XI, and XII.

6. In rendering judgment against the United States in the sum of $5,494.45 for the amount of Tenino sandstone quarried, cut, and delivered and quarried, cut, but undelivered under the facts disclosed in Finding VII.

7. In holding that the concrete toe described in Finding IX was not required to be put in by the terms of the contract at bar and in rendering judgment in favor of the claimants and against the United States for the cost thereof.

8. In holding that the change in the method of driving the foundation piles from the drop-hammer process as required by the contract to the water-jet process as verbally authorized and directed by the Secretary of the Navy and as described in Finding XI created any valid contract or assumpsit on the part of the United States to pay such increased cost, and in rendering judgment against the United States for expenses incurred by said change of method and for the delays incident thereto, as set forth in the courts' Findings Nos. XI and XII.

9. In holding that the Secretary of the Navy had any lawful right or authority to depart from the terms of the written contract at bar by verbal orders or directions.

10. In failing and refusing to enforce the provisions of the seventh paragraph of the contract at bar in accordance with its terms.

11. In rendering judgment against the United States and in favor of the claimants in any sum whatsoever upon the facts set forth in the findings.

BRIEF.

I.

CHANGE OF SANDSTONE.

The engineer in charge, under the provisions of the contract at bar, is not given authority to finally decide any question, doubt, or dispute arising under the contract. He is given a limited authority to approve certain material and work, subject to the requirements of the contract as to the quality of that material or work, and always subject to the revisory power of the Chief of the Bureau of Yards and Docks. The intention of the contract, as abundantly disclosed by the whole instrument, was that the Chief of the Bureau of Yards and Docks was to decide all questions arising during the performance of the work, and that he was to be the referee of all disputes or doubts, subject to an appeal to the Secretary of the Navy, whose decision was to be final and conclusive upon all parties. As they contracted so they performed. The character of the sandstone to be used in the ashlar was referred to the Secretary of the Navy by the claimants for his decision, and after full hearing was decided against them. This decision being unimpeached for fraud or mistake, is conclusive, and ousts the jurisdiction of the court over the original cause of action.

An examination of the contract at bar discloses that the person selected to determine the questions of material, workmanship, and all other doubts or disputes arising during the performance of the work was, in the first instance, the Chief of the Bureau of Yards and Docks, whose decision upon every such material was to be final and binding upon both parties, unless an appeal from his decision was taken to the Secretary of the Navy, in which event all the facts were to be laid before that officer and the reasons of either party presented in writing for his consideration and determination, and when so considered and determined it was to be final and conclusive upon both parties to the contract. The engineer is nowhere given authority in this contract to finally pass upon any question of its construction, or any question as to the character of materials to be used in the dock, or upon any matter whatsoever. He is given, in one or two places in the contract, authority to approve or disapprove of materials or workmanship, but his approval or disapproval is not made a finality either in terms or by implication. On the contrary, it is stipulated both by expression and by necessary implication that such approval or disapproval is subject to the revision of the Chief of the Bureau of Yards and Docks, whose decision upon the question shall be final unless an appeal be taken to the Secretary of the Navy, in which event the decision of that officer is to be a finality.

In the first place, the court will observe that this contract is entered into by the Chief of the Bureau of Yards and Docks, who is the party of the second part.

In the first paragraph of the contract it is provided (Transcript, p. 16) that the contractors—

> will at their own risk and expense, furnish and provide all labor, materials, tools, implements, and appliances of every description—*all of which shall be of the best kind and quality adapted for the work * * * subject to the approval of the civil engineer or such other competent officer or person or persons as may for that purpose be designated by the party of the second part.*

In the eighth paragraph of the contract it is provided:

> The aforesaid dry dock and its accessories and appurtenances and each and every part thereof shall be constructed of approved materials and in a thoroughly substantial and workmanlike manner, in accordance with the true intent, meaning, and spirit of the contract, plans and specifications *to the satisfaction of the party of the second part* [i. e., the Chief of the Bureau of Yards and Docks, who is the party of the second part].

Further on in this paragraph of the contract it is provided that—

> In case any question shall arise under this contract concerning penalties, such question, with all the facts relating thereto, shall be submitted to the Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon all the parties to this contract. (Transcript, p. 19.)

In the eleventh paragraph of the contract it is provided that under certain circumstances the contractors

may be entitled to such additional time for the commencement or completion of the work as in the judgment of the Secretary of the Navy shall be just and reasonable.

Paragraph 14 of the contract is as follows (Transcript, pp. 21, 22):

> It is expressly understood, covenanted, and agreed by and between the parties to this contract that if any doubts or disputes as to the meaning or requirements of anything in this contract, or if any discrepancies appear between the aforesaid plans and specifications and this contract, the matter shall be at once referred for the consideration and determination of the Chief of the Bureau of Yards and Docks, and his decision thereon shall be final, subject, however, to the right of the contractors to appeal from such decision to the Secretary of the Navy, who, in case of such appeal, shall be furnished by the contractors with a full and complete statement of the grounds of their appeal in writing, and shall thereupon take such action in the premises as, in his judgment, the rights and interests of the respective parties to this contract shall require; and the parties of the first part hereby bind themselves and their heirs and assigns and their personal and legal representatives to abide by his, the said Secretary's, decision in the premises.

Turning now to the specifications attached to and forming a part of the contract we find the following applicable to the issue now under consideration.

Under the head of "Intention" (Transcript, pp. 22, 23) we find it provided that—

> It is the declared intention and meaning of the contract to obtain, complete, a substantial dry dock, according to the general plans and specifications, to the entire satisfaction of the Bureau of Yards and Docks. Should there be any omissions in the plans or specifications of any work or material required to secure this result, such work or material is to be regarded as embraced in the plans and specifications and to form a part of the contract.

Under the general heading of "Stone masonry" (Transcript, p. 30) it is provided that—

> The ashlar must be of granite or sandstone, of quality approved by the engineer. All stones must be hard, clean, and free from seams and imperfections and of good bed and build. They must be laid true on their natural beds, and without pinning.

The contention of the claimants in this case and the judgment of the court below is solely founded upon this last-quoted provision of the specifications, and in total disregard of every other provision of the contract and specifications. The contention was made below and concurred in by the Court of Claims that, when a certain sandstone, known as Tenino sandstone, was submitted by the contractors to Mr. White, the Government engineer, who at that time had been appointed to supervise the construction of the dock, and was by him accepted for use in the ashlar of this dock,

his acceptance thereof was binding upon the United States, and that the sandstone so accepted by the said White must be used by the Government in the construction of this dock whether the same was suitable or unsuitable, fit or unfit, hard or soft, free from imperfections or not, because, forsooth, it had been accepted by the Government's engineer. Not only does this construction of this paragraph of the specifications totally ignore and set at naught every other express provision of the contract and specifications, as well as the whole spirit and intent of this instrument as gathered from its entirety, but likewise interpolates into the provision under consideration words which it does not contain and also ignores provisions which it does contain. The paragraph of the specifications under consideration provides that the ashlar is to be of granite or sandstone of quality approved by the engineer, but it does not say either in this provision or in any other provision of the contract or specifications that his approval is to be final. Not only so, but the paragraph under consideration contains limitations in the nature of a condition precedent upon which the engineer in charge is permitted to approve at all, to wit, the condition that "all stones must be hard, clean, and free from seams and imperfections, and of good bed and build." Manifestly, therefore, if the engineer in charge, either through ignorance or corrupt motives or from any other cause, shall accept sandstone for this ashlar which was not hard nor clean, nor free from seams or imperfections, nor of good bed and build,

his attempted approval of such material would be a complete nullity. The whole paragraph is to be taken together, and before the engineer in charge is given any authority whatsoever to approve this material the material must come up to the standard prescribed in this paragraph of the specifications. Now, who is to determine whether the stone approved by the engineer is a hard, clean, or faultless stone? This paragraph does not inform us, but when we turn to paragraph 14 of the contract, it is shown that the chief of the Bureau of Yards and Docks is the officer selected by the parties to the contract to settle this as well as all other doubts or disputes, subject to a right of appeal to the Secretary of the Navy, whose decision is to be final and conclusive upon all parties to the contract. After this stone had been accepted by Mr. White, and a small portion of the work upon the ashlar done, the attention of the chief of the Bureau of Yards and Docks was directed to the worthlessness and unsuitableness of this stone for the purpose for which it was being used, and immediately thereupon the chief of the Bureau of Yards and Docks caused thorough and exhaustive tests and analyses to be made of this Tenino sandstone, with the result that, to use the language of the finding of the court below (Finding VI, p. 41, 42):

> He reached the conclusion that said Tenino sandstone was not fit and suitable for the purpose for which it was proposed to use said stone; that said stone did not fulfill the requirements of the contract and the specifications as above recited; that it was not a hard stone,

> nor a clean stone, nor free from imperfections; that its absorbent qualities were too high; that its crushing strength was too low, and that it was in many essential particulars totally unfit and unsuitable and undesirable for the use in the ashlar of this dry dock.

The Chief of the Bureau of Yards and Docks having thus satisfied himself of the worthlessness of the stone proposed to be used, notified the contractors that the Tenino sandstone would not be received, and that they must furnish a sandstone which would come up to the requirements of the specifications.

At this point of the controversy the contractors, if they did not propose to live up to their covenant that this dispute should be submitted to the final arbitration of the Secretary of the Navy, should have refused to refer the dispute to that officer, refused to have furnished the sandstone required by the chief of the Bureau of Yards and Docks, and brought their action against the United States for damages for breach of the contract. If this had been done at this stage of the controversy, doubtless the court could have entertained the suit and have passed upon the contractors' rights by construing this contract and determined whether the sandstone selected by the engineer in charge must be received by the Government. But this the contractors did not do, but on the contrary proceeded with their rights under the contract, and submitted their case for decision to the Secretary of the Navy in strict conformity with the provisions of paragraph 14 of the contract. Whereupon that officer decided against the Tenino

sandstone and affirmed the decision of the Bureau of Yards and Docks, the court below finding (Finding VI, p. 42):

> From this decision of the Chief of the Bureau of Yards and Docks the claimants appealed to the Secretary of the Navy, who concurred in the opinion of the said Chief of the Bureau of Yards and Docks and concurred in his order requiring a different and better sandstone. The tests and analyses of said sandstone were made from samples furnished to the Bureau of Yards and Docks by the contractors and by the commandant of the Puget Sound station. The delay in arriving at the ultimate determination to require a better quality of sandstone, which was reached on the 24th of August, 1894, was partly caused by the fact that the claimants were in correspondence with the Secretary of the Navy in an endeavor to persuade him to accept said Tenino sandstone. The tests and analyses of said stone, as above recited, were made promptly.

The decision of this doubt or dispute, therefore, was made in strict accord with the provisions of paragraph 14 of the contract (Record, p. 21, 22), and it is submitted that the decision of the question by the Secretary of the Navy is final and conclusive upon the claimants as well as the Government; that it ousts the jurisdiction of every court over the original cause of action; that no suit can be brought upon the contract; that the only remedy of the claimants is by suit to set

aside the award of the Secretary of the Navy, and that if such suit is instituted the decision of the Secretary can not be avoided or set aside, except upon proof of actual fraud or such gross error as necessarily implies bad faith.

The foundation of the judgment of the court below was made to rest upon two grounds:

First because the court is of the opinion that the character of the stone to be used in the ashlar of this dry dock was not a "doubt or dispute" within the meaning of the fourteenth paragraph of the contract, for the reason that the question was not decided against them by the engineer in charge, but in their favor. In other words, the court holds that the only doubt or dispute which the parties agreed to submit to the arbitrament of the Secretary of the Navy is such doubt or dispute as arises between the engineer and the contractor.

In the first place, there is no language in paragraph 14 which warrants any such interpretation. If it had been the intention of the parties to have referred only such doubts or disputes to arbitration as might be initiated by the contractors and the engineer, the contract would have so provided. But it does not so provide, but on the contrary provides that "it is expressly understood, covenanted and agreed by and between the parties to this contract that if *any doubts or disputes as to the meaning or requirements of anything in this contract or if any discrepancy appears between the aforesaid plans and specifications and this contract the matter shall be*" etc

We have, then, an engineer who has accepted a sandstone which does not meet with the approval of the Bureau of Yards and Docks, under a contract which provides that this dry dock is to be built of material which shall be of the very best kind and quality adapted for the work (Transcript, p. 16), of approved material and in a thoroughly substantial and workmanlike manner to the satisfaction of the Chief of the Bureau of Yards and Docks (Transcript, p. 18, bottom, par. 8; specifications, p. 23, top), and which the Chief of the Bureau of Yards and Docks decides is an unsuitable and imperfect stone which does not fulfill the requirements of the specifications (Transcript, p. 30, bottom), and that it is neither clean nor hard, nor free from seams nor imperfections (Transcript, p. 41, bottom), and which he declines to receive for use in the ashlar of this dry dock. It might very well be argued, and the argument would seem to be conclusive, that inasmuch as the contractors had covenanted to construct this dock of material and workmanship of the very best kind and character and to the complete satisfaction of the Chief of the Bureau of Yards and Docks that the rejection by this officer of this imperfect sandstone and his disapproval thereof was binding upon the contractors and that they were compelled under their contract to furnish such material as would meet with the approval of the chief of the Bureau. But, however this may be, it certainly can not be contended that the issue concerning this sandstone was not a doubt or a dispute concerning something required by the contract or specifications which

was to be referred to the Secretary of the Navy for an ultimate and binding decision under the provisions of paragraph 14 of this contract, and the fact that the doubt or dispute did not originate with the engineer in charge is entirely immaterial.

In the second place, to put such a construction as this upon the provision of the specifications relating to the character of the ashlar to be used in this dock is to frustrate the whole spirit, purpose, and intent of this contract and these specifications, which is that the chief of the Bureau of Yards and Docks is to have the supervising power and control over the construction of this dock and is to decide all questions arising between the contractors and the Government, subject to a right of appeal to the Secretary of the Navy. The chief of the Bureau of Yards and Docks always has a supervisory power over the engineer, and the provisions of the contract and specifications which give him this supervisory power are of the utmost consequence to the Government to prevent anything in the nature of a fraudulent collusion between the engineer in charge and the contractor or to obviate the consequences of ignorance on the part of the engineer in charge and to prevent him through ignorance or otherwise from accepting any material which does not come up to the requirements of the specifications and which is imperfect and unsuitable for the construction of the dock. In a gigantic undertaking of this sort, involving the expenditure of millions of dollars, certainly there was no purpose on the part of the Government to leave the

selection of materials entirely to one engineer, who, by fraudulent collusion with the contractors or through ignorance or incapacity might destroy the whole completed structure by allowing defective and worthless material to be used in the process of its construction; and to avoid the possibility of this result the contract and specifications have amply safeguarded the interests of the Government by providing for the supervision and decision of all such questions by the Chief of the Bureau of Yards and Docks.

In the third place, the construction which we place upon this provision is the practical construction placed upon it by the parties themselves. When this doubt or dispute arose over this matter the claimants accepted the provisions of paragraph 14 as binding upon them and actually submitted this matter to the determination of the Secretary of the Navy; and it is thoroughly well settled that the practical construction placed upon a contract by the parties themselves and who perform their work and submit their rights in accordance to this construction is entitled to great weight, even if it is not binding upon the judiciary. (*Chicago* v. *Selden*, 9 Wall., 54.)

II.

The question concerning the quality of sandstone to be used in the ashlar of the dry dock having been actually submitted to the determination of an abitrator, pursuant to the provision of the contract requiring this to be done, and the arbitrator named in the contract having actually passed upon the question and made his award in conformity thereto,

his decision is binding and conclusive upon the appellees, ousting the jurisdiction of the court and rendering it impossible for the appellees to sue upon the original cause of action. The decision of the Secretary of the Navy, not having been impeached for actual or constructive fraud, will not be disturbed by the courts, but will be enforced as a finality.

The second ground on which the court below and the appellees in their brief seek to avoid the provisions of the fourteenth paragraph of the contract is that said provision is a mere agreement to submit all future disputes to arbitration, and hence is void on the grounds of public policy, and does not deprive the courts of their jurisdiction over an action upon the contract.

Assuming, *arguendo*, that the weight of the old authorities supports the doctrine that a *mere* agreement to submit all *future* disputes to the arbitration of *unnamed* persons will not, *unless followed by actual arbitration and award pursuant to such agreement*, oust the jurisdiction of the courts over suits upon the original cause of action and that such agreement, while *in fiere*, can not be enforced in equity by a bill for specific performance; yet it is likewise true, upon the same authorities as well as upon the universal and undissenting opinions of modern times:

(1) That if the parties to such agreement, prior to the institution of suit upon the original cause of action, actually do submit the dispute to arbitration, pursuant to the contractual agreement, and the arbitrator makes an award or decision upon the question thus submitted

(as was done in the case at bar), then such award or decision does oust the jurisdiction of the courts, no action at law nor suit in equity can be brought upon the original cause of action, and the award of the arbitrators can only be set aside in a direct proceeding for that purpose for fraud or such gross error as necessarily implies bad faith.

(2) That under a provision in a contract that any dispute arising thereunder shall be decided by a certain person, as a condition precedent, the parties can not resort to the courts in the absence of a decision by him or an offer by one and a refusal by the other to refer the dispute to his decision.

(3) That an agreement to submit all future disputes to arbitration is not void upon the ground of being contrary to public policy nor upon any other ground. The utmost limit to which the old authorities have ever gone is that such agreements will not oust the jurisdiction of the courts and will not be enforced in equity by suit for specific performance. But such agreements are not void, and the party refusing to arbitrate in accordance with such a contract is liable to the other party for all damages which he sustains by reason of this breach of contract.

(4) That the doctrine of the old authorities, founded as it was upon the jealousy of the common-law courts of their prerogative and the denial of the right of persons to settle their own disputes in their own way, is archaic, is totally unfounded either in reason or justice, and is hopelessly contrary to the spirit of

modern progress and the necessities of modern civilization. The doctrine will never be extended nor applied to any case unless the case is so identical with previously decided cases that the courts feel constrained, although against their will, to adopt the rule of *stare decisis*.

Of these in their order:

(1) It has already been shown, and is distinctly found by the court below as a fact (Finding VI, Record, pp. 41, 42), that the parties to this contract actually did submit to the Secretary of the Navy the doubt or dispute concerning the fitness and suitableness of Tenino sandstone for use in the ashlar of this dry dock, together with the question of whether the same came up to the requirements of the contract and specifications under and pursuant to and in strict accord with paragraph 14 of the contract; and that having been so submitted, the Secretary decided that said Tenino sandstone did not conform to the requirements of the contract and specifications in that the same was not a clean stone, nor a hard one, nor free from seams or imperfections; that the same was not of the best kind and character adapted to the work, and was totally unsuited for the use for which it was intended, and rendered a decision requiring the contractors to furnish other and better sandstone. The decision of the Secretary of the Navy, under the provisions of the contract, is binding and conclusive, and no suit will lie upon the original cause of action.

In Morse on Arbitration and Award (p. 91) the learned author, after laying down the general rule of

the old authorities to the effect that a simple agreement to refer all future disputes to unnamed arbitrators will not oust the jurisdiction of the court, says:

> But if, in pursuance of the agreement, the parties have proceeded to an arbitration, and an award has actually been made, it has precisely the same force as an award under ordinary circumstances, and the power of the courts to entertain a suit on the original contract is at an end.

The author cites *Haggart* v. *Morgan*, 5 N. Y. (1 Seld.), 422; *Miller* v. *The President, etc., of the Junction Canal Co.*, 53 Barb., 590.

The learned author might have cited many more cases, both old and new. Let us consider a few of these in their chronological order.

In 1746, in the King's Bench, it was determined in *Kill* v. *Hollister* (1 Wilson, 129) that, while a mere agreement of this sort will not oust the jurisdiction of the courts, an actual arbitration pursuant to such an agreement will do so, and prevent the possibility of an action being brought upon the original contract.

A like decision was rendered in 1793 by the lord chancellor in *Mitchell* v. *Harris* (2 Vesey, jr., 136).

In 1840, in the case of *Cleeforth* v. *Pickford* (7 Meeson & Welsby, 313, p. 320), Lord Arbinger, C. B., said:

> With respect to the last point made by Mr. Miller, it appears to be entirely a misapplication of the well-known rule of law that an agreement to refer is not binding. It is true that

> such an agreement is not binding unless it is acted upon, but when a reference has taken place and the award is made it becomes so. In one sense it does not oust the court of its jurisdiction, but in another sense it does; for when the award is made the jurisdiction of the court is gone; and all the courts have to say is whether the award is good or not.

In 1845 Mr. Justice Story, in *Tobey* v. *The County of Bristol et al.* (3 Story, 800, at p. 823), said:

> But where an award has been made before the revocation, it will be held obligatory, and the parties will not be allowed to revoke it, and the courts of law, as well as of equity, will enforce it.

In 1858 the celebrated Judge Moncure, delivering the unanimous opinion of the Virginia supreme court of appeals in *Condon* v. *The Railroad Co.* (14 Grattan, 302, at p. 317), said:

> But even if the agreement in this case came within the operation of the principle which prevents parties from ousting courts of law of their jurisdiction, it would not on that account be unlawful, but would only leave the parties at liberty to resort to the courts of law, as if no other mode of decision had been agreed upon by them. They would still be at liberty, at their election, to pursue the remedy agreed upon; and having pursued it to a decision, they would be bound and concluded thereby. Now, in this case the remedy agreed upon was pursued; the engineer made his final estimate, and

> the only complaint is that he made it erroneously. * * * Therefore, if the engineer did not exceed his authority in making the estimate it is final and conclusive; and that he did not has already been shown.

In that case the agreement between a railroad company and the contractor provided:

> And whereas the work must be inspected and received, it is hereby agreed that the engineer of the company, or some one appointed by him, shall be the inspector of said work; shall determine when this contract is complied with according to his judgment and fair interpretation, and the amount of the same, and all disputes and difficulties arising under the same; and his decision shall be obligatory and conclusive between the parties to this contract without further recourse of appeal.

It was held that the decision of the engineer was conclusive upon the parties, and that such contract was in all respects legal and binding. See to the same effect *Smith* v. *R. R. Co.* (36 N. H., 487), decided in 1858.

In 1881 Mr. Justice Staples, in delivering the opinion of the court in *Corbin* v. *Adams* (76 Va., 58, at p. 61), said:

> Such an agreement, not consummated by an award, is held to be no bar to a suit at law or equity; nor can it be the foundation of a decree for specific execution. In its very nature it must rest on the good faith and consent of the parties concerned. Parties litigant can not by

such arrangements oust the jurisdiction of the courts or deprive themselves of the right to resort to the legal tribunals for the settlement of their controversies. After the arbitrators have acted and rendered an award the case is very different. Their decision is binding upon the parties and can be successfully impeached only upon grounds which would invalidate any other judgment. This distinction between a mere agreement to submit and a submission consummated by an award is universally recognized by the authorities. (Morse on Arbitration, 79, 90.) One of the leading cases on the subject is that of *Tobey* v. *County of Bristol et al.* (3 Story, 822), where the whole subject is exhaustively considered and many decisions cited by Mr. Justice Story.

Decisions of like import might be multiplied almost without number but to no good purpose. Such is the universal doctrine of every court in every English-speaking nation of the world, and it is confidently submitted that not a single decision can be found to the contrary—except the decision of the Court of Claims in the case at bar.

(1a) The court below also seems to think that paragraph 14 of the contract at bar is illegal because the Secretary of the Navy, who is thereby made the arbitrator of doubts and disputes arising under the contract, is a party to the transaction, and that it is not lawful for people to contract to refer disputes to the decision of one of the parties to the transaction, and cites in support of its position a saying of Lord Coke,

wherein that learned commentator is charged with having said centuries ago that it becomes no man to be both judge and party in the same case. The court does not give its reference to this saying of Lord Coke's, and if it had it would have been found that his lordship's remark had reference to some other state of things than that of the free contractual act of the parties in selecting some person to arbitrate their own disputes. The parties are as free in this respect as the universal law of man's free agency, and the law does not undertake to restrict them in any manner whatsoever.

In Morse on Arbitration and Award (pp. 99 and 105) it is said:

> As a general statement it may be said that any person whomsoever may be chosen to fill the position of arbitrator. "Neither natural nor legal disabilities," says Russell, "hinder a person from being an arbitrator." And he adds that "it has indeed been laid down as law in works to which great respect is due that idiots, lunatics, infants, married women, persons attainted and excommunicated are disqualified for the office; but the better opinion is that they may be arbitrators; for every person is at liberty to choose whom he likes best for his judge, and he can not afterwards object to the manifest deficiencies of those whom he himself has selected" (p. 99).

At page 105 the learned author says:

> Even the rule that a party can not be judge in his own cause may be disregarded by par-

> ties in choosing an arbitrator. If two disputants agree that one of them shall finally determine the matter in issue, his award will be good, although it be in his own favor. (Citing many cases.)

In *Monongehela Navigation Company* v. *Fenlon* (4 Watts & Seargeant) it was held by the supreme court of Pennsylvania that if the parties to an executory contract make a provision in it that any dispute which shall arise between them on the subject of the contract shall be determined by an individual named, whose decision shall be final, no action will lie for a breach of the agreement by one against the other; but they must resort to the tribunal appointed by themselves, from whose award there is no appeal. If parties by contract appoint an arbiter to settle their disputes they are bound by his award, although he may be interested in the contract which was the subject of reference.

In *Railroad* v. *McGrann* (33 Pa. St., 530, at p. 533) the agreement was that the chief engineer of the railroad company was to be the arbitrator of all disputes arising under the contract and that his decision should be final and conclusive. The court said:

> The inquiry relates solely to the contract of the parties. In stipulating as they did that the chief engineer should be the umpire between them, it may well be that it was supposed the engineer would better than others understand the merits of any controversy that might arise. But it was also well known that the engineer was an officer of the company, paid by them, and that he held his office at their pleasure.

> The purpose of the agreement of submission was therefore not alone to select the most competent arbitrator, but to intrust the decision of any dispute to one whose very position was one of dependency upon the company. We have nothing to do with the prudence of such an agreement. It is ours to enforce the contract as the parties have made it. A party litigant may refer to his adversary, if he will, or to anyone interested adversely to himself. Such a submission will be enforced. (Citing a number of cases.)

To the same effect see *Railroad Company* v. *Riley* (7 Colo., 494).

(2) Under a provision in a contract that any dispute arising thereunder shall be decided by a certain person as a condition precedent, the parties can not resort to the courts in the absence of a decision by him or an offer by one and a refusal by the other to refer the dispute to his decision. All the cases heretofore cited uphold this rule. In addition, see:

Monongahela Navigation Co. v. *Fenlon*, 4 Watts & S., 205.

Reynolds v. *Caldwell*, 51 Pa. St., 298.

R. R. v. *McGrann*, 33 Pa. St., 530.

Lauman v. *Young*, 31 Pa. St., 306.

Denver, etc., R. R. Co. v. *Riley*, 7 Colo., 494.

Denver & N. O. Co. v. *Stout*, 8 Colo., 61.

Union Pacific R. R. Co. v. *Anderson*, 11 Colo., 30.

Loup v. *California S. R. Co.*, 63 Cal., 101.

Cox v. *McLaurin*, 63 Cal., 196.

Fox v. *R. R. Co.*, 3 Wall. jr., 243.

The case of *Hurst* v. *Litchfield* (39 N. Y., 377), which is cited by the court below, is discredited in *Delaware and H. Canal Co.* v. *Pennsylvania Coal Co.* (50 N. Y., 250), and is said, in *Weeks* v. *Little* (15 Jones & S., 1), to be overruled by it.

(3) Even a mere agreement to submit all future disputes to unnamed arbitrators is in no sense of the word a void agreement, but is only unenforcible by a suit for specific performance. The parties are still at liberty to pursue the method of settlement prescribed by the agreement, and if one of the parties refuses to abide by such agreement he will be liable to the other for all damages which he may sustain by reason of such breach of the contract.

In Morse on Arbitration and Award (p. 90) it is said:

> The party refusing or rendering it impossible to abide by the agreement to refer is liable to the other for damages, to be recovered in an ordinary suit based on the breach of the contract. But this is the only remedy of the injured party.

See in accord all the authorities which we have cited (*supra*) on the other points, and see also 2 Am. and Eng. Ency. of Law, 2d ed., 573, and cases there collected. See also *Corbin* v. *Adams* (76 Va., 58, at p. 61).

(4) The doctrine of the old authorities, even in its narrow and limited application, founded as it was on the jealousy of the common law courts of their prerogative and a denial of the right of persons to settle their own disputes in their own way, is archaic, is unfounded in either reason or justice, and is hopelessly contrary

to the spirit of modern progress and the necessities of modern civilization. The doctrine will never be extended nor applied to any case unless the case is so identical with previously decided cases that the courts feel constrained, even against their will, to adopt the rule of *stare decisis*.

In the case of *Fox* v. *R. R. Co.* (3 Wall., Jr., 243, 245, 246), Judge Grier, while upon the circuit bench for the third circuit, and who afterwards became a distinguished member of this court, said:

> The rule appears to be: First, that a condition in a contract that the sum recoverable on a breach shall be ascertained by arbitrators before the parties shall sue either at law or at equity, is not such an agreement as will be treated as invalid, or as an attempt to oust the courts of their jurisdiction; and secondly, that it is even doubtful whether there is any sufficient foundation, either in policy or principle, for the ancient and hitherto undoubted doctrine that parties can not bind themselves by contract not to resort to the courts of law or equity. Lord Campbell stated thus emphatically his views of the main question in dispute: "There is an express undertaking that no action shall be brought until the arbitrators have decided. There is abundant consideration for that in the mutual contract into which the parties have entered. Therefore, unless there shall be some illegality in the contract, the courts are bound to give it effect. There is no statute against such a contract. Then, on on what ground is it to be declared illegal?

> It is contended that it is contrary to public policy. That is rather a dangerous ground to go upon. What pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he should not be allowed to enter into such a contract." And his lordship subsequently traced, with much disapprobation, the origin of the opposite principle, which he attributed to the endless competition of the courts and their desire to absorb litigation into their respective jurisdictions. This obsolete dogma does not appear to have been received with approbation in Pennsylvania. * * * Such a clause in contracts like those constantly made by corporations for great public improvements is absolutely necessary to prevent the corporations from being ruined by endless litigation. It should be liberally construed and not subjected to ingenious criticism in order to support the jurisdiction of the courts of law and encourage litigation.

See the doctrine further criticised as standing on no solid reason by Coleridge, J., in *Scott* v. *Avery* (36 Eng. L. & Eq., 1).

In *Condon* v. *Railroad Co.* (14 Grattan, 302, at p. 316) the celebrated Judge Moncure, of the Virginia

supreme court of appeals, said, in delivering the opinion of the court:

> I am certainly not disposed to extend the operation of a rule which appears to me to have been founded on very narrow grounds, directly contrary to the spirit of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private individuals.

And so in the case of the *Delaware and Hudson Canal Co.* v. *Pennsylvania Coal Co.* (50 N. Y., 251, at p. 258), Allen, J., in delivering the opinion of the court, says:

> Were the question *res novo*, I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstance entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in anywise obstructed or hindered the arbitration agreed upon. * * * The better way doubtless is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties; and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to

courts of law; and the rule is essentially modified and qualified.

It is in deference to this spirit of modern times and the necessities of modern civilization that it is now universally held that an agreement by members of a voluntary benefit association that the decisions of its tribunals concerning a claim to benefits shall be conclusive is not against public policy, and such agreements are universally upheld as valid, binding, and conclusive.

See *Hembeang* v. *Knights of Maccabees* (101 Mich., 161); *Woolsey* v. *O. F. Lodge No. 23* (61 Iowa, 492); *Anacostia Tribe O. of R. M.* v. *Marbach* (13 Md., 91).

We have not been able to find, after an exhaustive search through the decisions of this court, that this subject has ever been passed upon in this tribunal, except in the case of the *Excelsior* (123 U. S., 40), wherein it was held that a mere verbal understanding that if the salvage company and the owner of the steamship did not agree upon the amount of salvage the same was to be determined by some unnamed arbitrator would not prevent the court from decreeing salvage, where such verbal agreement had between the captain of the salvaged ship and the captain of the wrecking crew had not been acted upon by the parties. In the absence therefore of any decisions by this court on this subject it is believed that this court, which is not bound by any precedent save that which is founded upon solid reason and justice, and wherein no former decision has persuasive effect except so far

as the soundness of the decision commends itself to the judicial mind, will cast itself aloof from the senseless and obsolete dogma of the common law and declare that the contracts of parties which are lawful in themselves and which are neither *mala prohibita* nor *mala in se* will be enforced by the courts according to their terms, and, recognizing the necessities of modern civilization, the law's delays and the crowded dockets of the courts, permit citizens to settle their own disputes in their own way.

Whatever view, however, the court may take upon this subject is immaterial for the necessities of the case at bar. The subject-matter of this dispute having been submitted by the parties to arbitration in strict accord with the provisions of the contract, and the arbitrator selected by the parties having rendered his decision in strict accord with the provisions of the contract, that decision can not now be impeached by either party except in a direct proceeding for that purpose and in such proceeding will not be annulled or set aside except upon satisfactory proof of actual fraud or such gross error as necessarily implies bad faith. To this effect are the unvaried decisions of this court. (*United States* v. *Gleason*, 175 U. S., 588, 602; *R. R. Co.* v. *March*, 114 U. S., 549; *Chicago, etc., R. R.* v. *Price*, 138 U. S., 185; *Kihlberg* v. *United States*, 97 U. S., 398.)

The case of *Burchell* v. *Marsh* (17 How., 344) was a bill in equity, filed for the purpose of having an award rendered by arbitrators set aside. It was held

that if the award be within the submission and contains the honest decision of the arbitrators, a court of equity will not set it aside for error either in law or of fact. Mr. Justice Grier, delivering the opinion of this court, said:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be the substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement not the end of litigation. "In order," says Lord Thurlow (*Knox* v. *Symmonds*, 1 Vesey, jr., 369), "to induce the court to interfere, there must be something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence; but in case of mistake, it must be made out to the satisfaction of the arbitrator, and that if it had not happened, he would have made a different award."
>
> Courts should be careful to avoid a wrong use of the word "mistake," and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. The same result would follow if the court should treat the arbitrators as guilty of

> corrupt partiality, merely because their award is not such a one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion.

The case of *District of Columbia* v. *Bailey* (171 U. S., 161), which is relied upon by counsel for appellees, has no sort of application either to the facts or the principles involved in the case at bar. In that case this court decided that the Commissioners of the District of Columbia have no power to agree to a common-law submission of a claim against the District, and that any attempt to do so would be to exercise powers not vested in the Commissioners, and hence would be void *ab initio*, and being void, of course the decision of the arbitrator upon such an alleged submission would be also void and could not be enforced. In that case the court makes an exhaustive examination of the authorities to the effect that an agreement to submit is a contract, and that no person, municipality, or ministerial agent who lacks the power to contract can possibly agree to such a submission. The court then examines the various statutes relating to the District of Columbia and to the office of Commissioner of the District, and reaches the conclusion that the District Commissioners are merely administrative officers and that the whole sum of the municipal powers of the District of Columbia is neither vested in nor exercised by the District Commissioners. They are, on the contrary, vested in the Congress of the United States,

acting *pro hac vice* as the legislative body of the District, and the Commissioners of the District discharge the functions of administrative officials.

No such considerations can arise in the case at bar, for the reason that the contract in question was made under and pursuant to a direct authority from the Congress, authorizing and directing the Secretary of the Navy to acquire a certain piece of land on Puget Sound, at Port Orchard, in the county of Kitsap, State of Washington, at such point as he may select * * * and to have constructed by contract, after public advertisement upon said land so selected for naval and commercial purposes, a dry dock of certain described dimensions. (Act of March 2, 1891, 26 Stat. L., p. 804.)

Pursuant to the authority thus vested the contract for the construction of the dry dock was made, embodying among other things this provision for the final settlement of disputes or doubts arising in the process of its construction. It was by no means a common-law agreement to submit an already existing dispute to the arbitration of a third person, and therefore does not in anywise fall within the ruling of this court in *District of Columbia* v. *Bailey* (*supra*). The legislative power given to the Secretary to contract for the construction of this dock necessarily delegates to that officer full power to draw a complete and binding contract between the contractors and the United States, and carries with it the inherent power of providing for the settlement of disputes and disagreements which

inevitably arise in the construction of public works of such great magnitude and expense. But aside from the specific authority thus vested in the Secretary of the Navy, he is amply clothed with such authority by the act of April 30, 1798, creating the Navy Department, as was expressly held by this court in *United States* v. *Corliss Steam Engine Co.* (91 U. S., 321).

It is therefore submitted that the amount for which judgment was entered upon Finding VII, to wit, the sum of $21,108.88, is clearly erroneous, and that the same should be reversed with instructions to dismiss. For the same reason it is submitted that the judgment of the court below in favor of the United States upon the facts found in Findings VIII and X is clearly correct and should be affirmed, for the reason that both of the issues involved in these two findings were submitted, the one before and the other after the work was done, to the decision of the Chief of the Bureau of Yards and Docks and by that officer decided in accordance with paragraph 14 of the contract. It does not appear from these findings that the claimants exercised their right of appeal to the Secretary of the Navy under Findings VIII and X, but that is entirely immaterial, since by said paragraph 14 of the contract the decision of the Bureau of Yards and Docks is made a finality unless, except, and until the contractors exercise the right there given to them of appeal to the Secretary of the Navy.

III.

ADDITIONAL REASONS WHY THE AMOUNT OF THE JUDGMENT OF THE COURT BELOW RENDERED UPON THE FACTS SET FORTH IN FINDING VII IS ERRONEOUS.

In Finding VII the court rendered judgment against the United States for the difference between the cost of the Sucia Island and the Dog Fish Point sandstone and what would have been the cost of the Tenino sandstone if the same had been accepted and they had been allowed to complete the ashlar with said latter sandstone. The court finds that the total cost of said Sucia Island and Dog Fish Point sandstone was $33,556.23, and that the total cost of Tenino sandstone would have been $17,948.80, and the court proceeds to render judgment against the United States for the difference between these sums, to wit, the sum of $15,607.43. This judgment of course necessarily includes the total cost of all of the Sucia Island and Dog Fish Point and likewise the total cost of all of the Tenino sandstone that would have been necessary for the construction of the ashlar, and the difference between these sums is necessarily the total difference between the cost of all of the sandstone required for this purpose. And yet the court proceeds to render an additional judgment against the United States in the sum of $5,494.45 for certain Tenino sandstone, some of which was delivered at the dry dock and some of which remained at the quarry. Manifestly the cost of this Tenino sandstone either has been or should have been included in the total cost of the

Tenino sandstone necessary to construct the ashlar. If it has been so included and is embraced in the $17,948.80, which the court says would have been the total cost of all Tenino sandstone, then it is manifest that in rendering judgment for it again the court has duplicated this part of the judgment. If, on the other hand, this sum has not been included in the total cost of Tenino sandstone, then it is manifest that it should have been in order to arrive at the difference between the cost of the two varieties of sandstone, and that the total cost of Tenino sandstone, instead of being placed at $17,948.80, should have been that sum plus $5,494.45, making a total of $23,443.25. From the total amount of the cost of the other grade of sandstone, therefore, should have been deducted the total amount of the cost of all Tenino sandstone, making a difference of $10,112.98. It is perfectly manifest, therefore, that if the total cost of Tenino sandstone is $17,948.80 and the total cost of the other grade of sandstone was $33,556.23, that the total judgment in this finding should have been $15,607.43 instead of $21,108.88. On the other hand, if, in the total cost of Tenino sandstone, as stated by the court, they have not included the value of the sandstone quarried, then the value of that Tenino sandstone should be added to the cost of all sandstone which they would have been required to quarry in the future, and the total cost of all Tenino sandstone should be $23,443.25, which, being subtracted from $33,556.23, makes a difference of $10,112.98, which should have been the total judgment of the court under this finding.

In addition to this manifest error, it is further submitted that the facts set forth in Finding VII, taken in connection with the contract between the claimants in this case and the Tenino Stone Company, as set forth on page 36 of the transcript, utterly fail to support the judgment for $5,494.45, which the court rendered against the United States for certain Tenino sandstone, some of which was quarried and delivered at the dock and some of which was quarried but not delivered. The court finds in Finding VII that "this sum has not been paid by the claimants to the owners of the said Tenino stone quarry, nor does it appear that any action or suit has ever been brought against said claimants for said sum of money." This money, therefore, does not represent any actual outlay on the part of the claimants, and manifestly if they are permitted to recover from the United States in this action they could only do so as trustees for the benefit of the Tenino stone quarry. Turning now to the contract between the Tenino stone quarry and the claimants (Rec., p. 36), it will be observed that the claimants were to pay nothing for this stone unless, except, and until said stone was accepted and approved by the United States, and that even when so accepted and approved, and even when actually used, was not to be paid for until the claimants had received their pay from the United States. There was, therefore, no liability on the part of these claimants to pay for any sandstone which in fact was not accepted and paid for by the United States, and inasmuch as none of this

stone was accepted or paid for by the United States, but on the contrary was repudiated and refused, it follows that under this contract between the claimants and the Tenino Stone Company no cause of action exists in favor of the stone company against the claimants, and inasmuch as the claimants have not actually paid, and never can be made to pay for this stone, no judgment in favor of the claimants can be rendered therefor against the United States. The court below and the counsel for the appellees urged that this subcontract can not be interposed as a defense against this claim, founding their contention upon *Masterson* v. *The Mayor* (7 Hill, 61). But there is nothing in that case either in fact or principle which affects the matter here. The fact remains that the claimants have not expended one dollar for this stone and are under no legal obligation whatever to pay for it.

In *United States* v. *Smith* (94 U. S., 214, 218) this court said:

> The United States can only be required to make compensation to the contractor for damages which he has actually sustained by their default in the execution of their undertakings to him; but this is the extent of their liability in the Court of Claims. More than compensation for damages actually sustained can never be awarded against the United States.

In any event it is therefore submitted that this $5,494.45 should be deducted from the total judgment rendered upon Finding VII and the amount of that judgment reduced accordingly.

IV.

CONCRETE TOE TO PROTECT SHEET PILING.

The facts concerning this item are set forth in Finding IX (Transcript, p. 43).

The expression "Navy Department" in this finding is not very clear. But whether the work here described was ordered by the Chief of the Bureau of Yards and Docks or by the Secretary of the Navy, the work was ordered to be done, not as extra or additional work, but as something necessary and proper to be done in order to secure a dock "constructed of approved materials and in a thoroughly substantial and workmanlike manner to the satisfaction of the Chief of Bureau of Yards and Docks" (see contract, par. 8, Transcript, p. 18), and in compliance with the specific requirements of the specifications (Transcript, p. 31), and in accord with the contractual stipulation enabling the Secretary to settle "all doubts or disputes as to the meaning or requirements of anything in this contract" (contract, par. 14, Transcript, pp. 21 and 22).

It needs no argument to show that if the sheet piling and timber work described in this finding were not protected by concrete or some other device from the teredo, the inroads of these insects, which are so numerous and destructive on the Pacific coast, would soon have destroyed the foundation upon which the superstructure of the discharge culvert was built, and that the whole structure would have soon come to grief. The encasing of this work in concrete was plainly required in order to meet the contractual re-

quirements that the dock and its accessories should be constructed in a thoroughly substantial and workmanlike manner. The plans for this dock do not accompany the findings, and in their absence it is impossible to determine whether this concrete toe was delineated upon said plans or not. But this is entirely immaterial, inasmuch as the contract and specifications in numerous places most minutely and emphatically require that anything and everything shall be done which is necessary to be done in order to secure a thoroughly substantial and workmanlike structure, whether the same is shown upon the plans or not. (See Transcript, pp. 18, 23, and 24.)

The allowance of extra pay for the work described in Finding IX is clearly erroneous.

V.

EXPENSE OF EXPERIMENTS WITH WATER-JET SYSTEM OF PILE DRIVING UNDER VERBAL DIRECTION OF THE SECRETARY OF THE NAVY.

This item is embraced in Finding XI (Rec., p. 44), and amounts to the sum of $1,156.76.

During the progress of the work the soil at the bottom of the dock proved to be of a tenacious and unyielding character, difficult of penetration by the ordinary drop-hammer system. On the 15th of February, 1894, it was stated that the round piles which were then being driven penetrated to a depth of from 8 to 10 feet. It was stated by the Bureau of Yards and Docks, in answer to this statement, that while round piles penetrating 8 to 10 feet might be satisfactory, dependent

upon the resistance shown by the first blow, yet the Bureau thought that these piles should be driven to a depth of 15 feet below the bottom of the excavation, if possible. A copy of this letter was furnished to the contractors, but when the report for piles driven in February was received it was found that the average of 76 piles driven on the 15th of February was but 5 feet 0.77 inch, none going to 8 feet; and of the 51 piles driven on the 16th the average was 5 feet 0.64 inch, none going to 8 feet; and the average depth of the 891 piles driven in February was only 6 feet 0.82 inch. The general average for February was much reduced by the piles driven in the latter part of the month, after the attention of the contractors had been called to the unsatisfactory depth reached by the piles. This report called forth from the Bureau other letters in March and April, urging that the piles be driven to a greater depth and reiterating the instructions contained in the Bureau's letter of February 27. There was no claim made at this time by the contractors that they could not reach a greater depth than that hitherto reported. Thereupon the Bureau telegraphed definite instructions on the 13th of April to accept no piles driven to a less depth than 15 feet. The contractors made no attempt to show that they could not drive piles to that depth or to a greater depth than had been obtained, but employed experts to give an opinon after tests upon the piles driven to show that the Bureau was wrong. On the 21st of May, 1894, while the Secretary of the Navy was on a visit to said dry dock

he verbally authorized the contractors to sink the piles by the method known as the water-jet system; that is to say, by forcing water into the ground by means of a sink pipe operated hydraulically, thus forming a hole into which the pile was set. Against the protest of the contractors this method was employed for a short time, resulting in the disintegration to some extent of the bottom of the pit. Thereupon, and by direction of the Secretary of the Navy, a board of civil engineers was convened to pass upon the feasibility of driving the piles by the water-jet system. They recommended against it, and the remaining piles were driven by the drop-hammer process as heretofore, and reached an average depth of 10 feet 4 inches. The aforesaid board of civil engineers also, by direction of the Secretary of the Navy, passed upon the expense to which the contractors had been put on account of this verbal order of the Secretary directing them to sink said piles by the water-jet system, and recommended an allowance to said contractors therefor in the sum of $1,156.76. This amount was approved by the Secretary of the Navy and a voucher therefor drawn, but when the same came before the Auditor for the Navy Department for audit and before the Comptroller of the Treasury for payment, it was refused upon the ground that the same was not extra and additional but required and contemplated by the contract, and upon the further ground that the Secretary of the Navy had no authority in law to order the work done or to bind the United States for its payment.

The question presented by the facts concerning this item is purely one of authority. It is submitted that the Secretary of the Navy had no authority to order the foundation piles in the bottom of this dock to be driven by the water-jet system in violation of the plain provisions of the specifications requiring the same to be driven by the drop-hammer process until a satisfactory depth has been reached and the penetration is not more than one-fourth of an inch under the last blow of a hammer weighing 3,000 pounds falling 25 feet, or the equivalent thereof (Transcript, p. 28), unless, except, and until, as is further provided in the specifications (Transcript, p. 26, bottom), and in the seventh paragraph of the contract (Transcript, p. 18), the contemplated change shall have been determined upon by a board of naval officers appointed for that purpose, and the amount of the increased compensation fixed and agreed upon. It is also submitted that the Secretary of the Navy was inhibited from incurring this expense by the positive provisions of statutory enactments. Of these in their order.

1. Not only does the contract inhibit any change from being made in the plans and specifications in any respect, except upon the written order of the Bureau of Yards and Docks, and that if at any time it is desired to make such change the modification or change must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change and the nature thereof and the increased or diminished compensation resulting

therefrom, and providing that whenever such change shall either increase or diminish the cost of the dock by the sum of $500 the actual cost thereof shall be determined by a board of naval officers appointed for the purpose before the work is done, and that the contractors shall be bound by the determination of such board as to such increased or diminished compensation, but it also provides that—

> No further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part.

This provision of the contract is squarely within the principle laid down by all the authorities cited in the first division of this brief, that it is entirely competent for the parties by their contract to make the decision of any person or persons a condition precedent to the right of action upon the contract. In that case such decision is a part of the cause of action. Until the decision is made and the cause of action thus becomes complete, the courts have no jurisdiction of the case, and therefore can not be said to be ousted of their jurisdiction by the contract. They can only be said to be ousted when an independent cause of action exists, or will exist, which is itself referred to the decision of the arbitrators. This principle is commonly applied to building contracts and the like, in which it is stipulated that compensation for the work is not to be paid until

the work has been accepted and the amount of compensation ascertained by an architect, engineer, or other referee. (*Condon* v. *South Side R. R. Co.*, 14 Grattan (Va.), 302, 314; *Scott* v. *Avery*, 36 Eng. L. & E., 1.)

In Morse on Arbitration and Award (p. 93) it is said:

> But if the parties agree substantially to make the reference a condition precedent or necessary preliminary to the institution of a suit, then the reference must be carried out. Thus, if in a building contract it should be provided that the architect's certificate of the value of any extra work should be obtained as a condition precedent to the right to bring an action for such value, then the certificate would have to be procured before suit could be maintained. Or the stipulation may be to pay so much as a third person shall determine to be just; or it may be that work shall be done or materials furnished to the satisfaction or acceptance of a third person; or that the price to be paid shall be dependent upon his decision as to the quantity, quality, or price of the material or workmanship. In each of these cases the action of the third person must take place before the right to sue can mature. (Citing a number of cases)

See in accord all the cases cited in Division I of this brief.

Now, in the case at bar it had been expressly contracted that no payment whatever was to be made for any extra work or materials which departed from the

plans and specifications unless the agreement had been reduced to writing and signed before the obligation arising from such change or modification had been incurred, and then only to pay such sum as shall have been determined by a board of naval officers appointed for that purpose, the contractors and the Government to be alike bound by the determination of such board or the majority thereof. Manifestly this contract makes it a condition precedent that such agreement should be reduced to writing before the obligation is incurred, and also that the price of such extra work shall be determined by this board of naval officers before any right whatsoever is given to the contractors to sue upon this obligation. It is a part of the cause of action itself, and unless the requirements of this clause of the contract are fulfilled then no cause of action can possibly arise under it, and the courts are without jurisdiction to entertain an action upon it.

If it be contended that the Government is given the advantage in such contract, the complete answer is, *Such is the contract.*

In the case of the *Hudson Canal Company* v. *The Pennsylvania Coal Company* (8 Wall., 276), it was held that—

> In the case of a contract drawn technically and in form and with obvious attention to details, a covenant can not be implied in the absence of language tending to a conclusion that the covenant sought to be set up was intended. The fact that the nonimplication of

> it makes the contract, in consequence of events happening subsequently to its being made, quite unilateral in its advantages, is not a sufficient ground to imply a covenant which would tend to balance the advantages thus preponderating.

These doctrines are upheld by this court in the late case of *The Sun Pub. Co.* v. *Moore*, No. 49 of the present term, decided January 13, 1902.

It is idle to talk of an implied contract arising out of this transaction and to prate of the claimants being entitled to compensation upon a *quantum meruit*, for the reason that the written contract was in no wise abrogated, but remained at all times in full force and effect, and manifestly an express contract and an implied contract can not exist concerning the same transaction at the same time.

In *Hawkins case* (96 U. S., 689, 696, 697, 698) this question was elaborately examined, and upon this point the court said:

> Express stipulations can not be set aside or varied by implied promises; or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned, or has been varied by the consent of the parties. Hence the rule is that if there be an express written contract between the parties, the plaintiff in an action to recover for work and labor done or for money paid must declare upon the written agreement so long as the special agreement remains in force and

> unrescinded, as he can not under such circumstances recover upon a *quantum meruit*. (Citing a number of cases.)

It can not be contended in this case that this provision of the written contract was rescinded by consent of the parties or abrogated by mutual consent. The Secretary of the Navy was not a party to this contract, did not sign it, and had no authority to change its terms. The clause of the contract under consideration expressly provides that the agreement for the change or modification in the plans must be accepted and approved by the chief of the Bureau of Yards and Docks, who is the party of the second part to this instrument, and who alone had any authority to authorize or accept any changes or modifications in the contract, plans, or specifications.

And herein is the fallacy of counsel for the claimants in applying the case of *Ford* v. *United States* (17 C. Cls. R., p. 60) to the case at bar in an effort to show that the principals may so act as to waive the provisions of a written contract. In Ford's case the person who ordered the extra work was the person who signed the contract and who was the party of the second part, but the court expressly say that if the work had been ordered by any officer other than the one signing the contract the decision would have been different. On page 78 the court say:

> If the contract in this case had been made by the Chief of Engineers, the extra work ordered by the engineer in charge would have been

> without authority and at the risk of the contractors, and the case would have been like that of *Hawkins* (*supra*). Or if the extra work, instead of having been ordered by the officer who made the contract, had been ordered by the local assistant engineer who supervised the work, it would have been an order prohibited by the contract, and the case would have been like that of *Braden & Angus*. (16 C. Cls R., 389.) But here Major McFarland had the same authority to order the extra work that he had to make the original contract.

So in the case at bar, if this departure from the plans and specifications had been ordered by the Chief of the Bureau of Yards and Docks, there might have been some room to contend that the provisions of the written contract had been waived by an officer clothed with that authority, to wit, by the principals. But such is not the case, and the Secretary of the Navy had no more authority to waive the provisions of this contract than did the humblest laborer employed upon the work.

(2) But not only is the Secretary of the Navy inhibited from incurring such an obligation by the specific provisions of the contract itself, but he is likewise commanded not do so by the provisions of statute law. By section 3679 of the Revised Statutes it is provided that—

> No department of the Government shall expend in any one fiscal year any sum in excess of the appropriations made by Congress for that fiscal year, or involve the Government in

any contract for the payment of moneys in excess of such appropriations.

Section 3732, Revised Statutes, provides:

> No contract or purchase on behalf of the United States shall be made unless the same is authorized by law and under an appropriation adequate to its fulfillment.

Section 3733, Revised Statutes, is as follows:

> No contract shall be entered into for the erection, repair, or furnishing of any public building or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for that specific purpose.

Section 3744, Revised Statutes, requires the Secretary of the Navy to cause all contracts made by his Department to be reduced to writing and signed by the contracting parties with their names at the end thereof. This last act has been held to be a statute of frauds as clearly as that of 29 Car. II, and contracts not made in conformity with its provisions are absolutely void. (*Clark* v. *United States*, 95 U. S., 541; *South Boston Iron Works* v. *United States*, 118 U. S., 37, 42; *Chap. of Calvary Cathedral*, 29 C. Cls. R., 269.)

The limitations imposed upon the authority of the Secretary of the Navy to bind the Government for the payment of money must at all times be known to and considered by the claimants, and it is incumbent upon them to know that no officer of the Government has authority to bind the Government for the payment of money except in strict and literal accord

with the permission given by statute. It is a favorite fallacy to assert that the Government is bound by its contractual obligations as are private persons, thereby seeking to show that whenever a resultant benefit occurs to the United States there arises in consequence thereof an obligation to pay for the benefit thus received. Nothing could be further from the truth, and the error of the conclusion consists in the falsity of the premises upon which it is based. Viewed in the strict application of contract law, it is true in many, if not all, particulars that the Government is bound by its contracts as are individuals, and that the same principles which are determinative of individual contractual rights are to be applied to the contracts of the Government; but, like every other general allegation, this statement of a principle, while it contains a broad foundation of truth, carries with it a trenchant disregard of accuracy in detail, the result of which is to rob the statement of its potency. In this case the insurmountable obstacle in the way of the application of such a principle is the total disregard which it has of the law of agency. It may be that after a contract is duly and properly and regularly made in strict accord with the provisions of law its interpretation will be governed by the same principles as are applied to private parties, yet it by no means follows that the same acts which would make a contract or incur an obligation for the payment of money between individuals will have a like effect between the individual and the Government; and this is because of the difference

between the authority of an agent to represent a private person and the authority of a public officer to represent the Government. The agent of a private person has authority to bind his principal for whatever he may do and whatever promises he may make so long as he acts within the general scope of his employment; and hence if the Secretary of the Navy had been acting as the agent of a private individual and within the scope of his general employment in and about the representation of that individual in the construction of this dry dock and had authorized the sinking of these piles by water-jet system and promised to pay for it, his principal would probably have been bound by such order and such promise. But the law of agency is very different with a public officer. A public officer is limited in the exercise of his capacity as an agent of the Government by the positive commands of statute law, and can only bind the Government when he has express authority to do the very identical thing and to make the very identical promise which he did do or did make. In the one case the authority is inclusive, and in the other it is exclusive. This distinction is nowhere better stated than by Mr. Justice Clifford, in the case of *Whiteside v. United States* (93 U. S., at pp. 256, 257), wherein for the full court he said:

> Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals in the latter category are in many cases bound by the acts and

declarations of their agents, even where an act or declaration was done or made without any authority if it appear that the act was done or declaration made by the agent in the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority or that he had been held out as having authority to do the act or was employed in his capacity as a public agent to do the act or make the declaration for the government. Although a private agent acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistake of public officers or agents than to adopt the rule which, through improper combinations or collusions, might be turned to the detriment and injury of the public. Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such case that ignorance of the law furnishes no excuse for any mistake or wrongful act.

See in accord, Story on Agency, 6th ed., 307a; *Lee* v. *Monroe* (7 Cranch, 376); *Mayor* v. *Eschback* (17 Md., 282); *State* v. *Hayes* (52 Mo., 578); *Delafield* v. *The State* (26 Wend., 238); *Mayor* v. *Reynolds* (20 Md., 10).

It was early settled that the promises of a Cabinet officer or any other agent of the Government to pay

money or to obligate the Government for the payment of money, if made without authority of law, is absolutely void. (*Stansbury*, 8 Wall., 33.) In this case the Secretary of the Interior employed one Stansbury, who was a clerk in that Department, to represent the Government at the London Crystal Palace Exposition, and agreed to pay him therefor, in addition to his salary as a clerk in the Interior Department, a certain sum of money. There was, however, a statute upon the books which inhibited an officer of the Government from paying additional compensation to a person in its employ under regular salary, and upon the suit of Stansbury for the recovery of the amount promised him by the Secretary of the Interior it was held in the Court of Claims and affirmed in this court that the promise of the Secretary being in violation of this statute was a complete nullity and that no recovery could be had. So in the recent case of *Garlinger* v. *United States* (169 U. S., 316), a statute provided for the payment of night inspectors at $3 per day, and it was held that the Secretary of the Treasury had no authority by regulation or otherwise to divide up a day into two or more parts or to resort to any device whereby the compensation of such inspector could be increased to more than $3 for any one calendar day.

The Government does not guarantee the capacity, fidelity, or integrity of its officers or agents, and all persons dealing with them must know at their peril the extent to which they have authority to bind the Government, and their ignorance on this subject can not

increase the Government's risk. (See *United States* v. *Beebe*, 180 U. S., 343, 354; *Dox* v. *Postmaster-General*, 1 Pet., 318, 325; *McElrath* v. *United States*, 12 C. Cls. R., 201, 216, affirmed upon appeal in 102 U. S., 426, cited with approval in *United States* v. *Wisconsin R. R. Co.*, 164 U. S., at p. 207; *Hume* v. *United States*, 132 U. S., 406; *Moffatt* v. *United States*, 112 U. S., 24, 31; *Steele* v. *United States*, 113 U. S., 129; *United States* v. *Barlow*, 132 U. S., 271.)

It will be readily seen to what dire results we should come if the doctrine were to obtain that a Cabinet officer or any other official of the United States could, in violation and disregard of the statutes, employ persons for the erection of buildings or the performance of public works at his pleasure, and then by accepting the benefit of the same raise an obligation for the payment thereof which could be enforced by judgments in the Court of Claims. The result would be that the Government might be plunged in debt. There would be no necessity for a Congress to make appropriations and it would be impossible to tell at any given time what the obligations of the Government would be.

However much, therefore, our natural inclinations might lead us to sympathy with the claimants in this item, it is impossible that a judgment could be had for it because of the utter lack of authority on the part of him who contracted the debt. The only recourse that the claimants have is by an appeal to the Congress, which has the power to reimburse the claimants for these expenditures.

VI.

DAMAGES FOR DELAYS INCIDENT TO THE EXPERIMENTATION WITH THE WATER-JET SYSTEM.

This item is set forth in Finding XII, and is founded upon the delay in the construction and completion of the dry dock brought about by the experimentation with the water-jet system of driving the piles, as is detailed in Finding XI. The court below found that the delay in the construction and completion of the dock by reason of this cause amounted to a period of seventy days, exclusive of Sundays, for which they gave the claimants judgment in the sum of $2,625.

What has just been said under Division V of this brief is equally applicable to this item, with the added reason that the Secretary of the Navy never recognized this matter of delay as an element of cost, expense, or damage to the claimants. He did not recommend any payment for it nor did he procure its reference to the Court of Claims under the provisions of section 1063 of the Revised Statutes, as he did the question of expense concerning this matter as set forth in Finding XI. This claim evidently did not meet with his approval and does not have his sanction. It is expressly provided in the contract that all delays caused by the Navy Department or authority by any officer or agent of the Navy Department which shall operate as a delay upon the final completion of the dry dock shall entitle the contractors to a corresponding extension of time for the completion of the same. These delays therefore, if any, are not to entitle the claimants to additional or

further compensation, but merely entitle them to additional time for the completion of the structure. The case in this respect is identical with that of *Garlinger* v. *United States* (169 U. S., 316). In that case there was a regulation of the Treasury Department providing that night watchmen should be divided into two watches as nearly as possible, both watches to perform duty every night, and empowering the surveyor of the port to make such changes in the division of the watches as he may deem expedient, and to appoint the hours of duty for different watches, and that when it was necessary to assign a night watchman to a vessel or to any other all-night charge, the night watchman so assigned must remain on the vessel or on his charge until relieved, but would be excused from performing any duty the following night. The claimant in the case was required to serve upon all-night charges and was not excused upon the following night. He brought suit in the Court of Claims, claiming additional compensation for this additional work. But this court held that no such construction could be placed upon the regulation in question, the court through Mr. Justice Shiras saying:

> Nor do we think that such a construction can be properly given to the regulation in question. Nothing is said therein of double pay in case the officer serves both watches. In such a case the provision is that he will be excused from performing any duty the following night. This express provision negatives the inference that if he serves an all-night watch he will be entitled

> to double pay, and it certainly does not afford a ground on which to base an implied contract for full pay for both watches.

So in the case at bar it is expressly provided that any delays caused by the Navy Department shall entitle the claimants to a corresponding extension of time within which to complete the dry dock. This express provision negatives any implication that the claimants are to be entitled to extra pay by reason of such delay, and it certainly does not afford sufficient ground upon which to base an implied contract to pay damages for such delay.

The statement in Finding XII that the board recommended that the claimants were "equitably entitled" to some damages for delay is entirely unavailing, since it is not shown that this board was given any power to express any opinion upon such question. In Finding XI (Transcript, p. 45) it is stated that this board "was convened for the purpose of reporting upon the advisability of sinking the piles by the water-jet system" The finding then goes on to state that the board met, examined this question, and reported adversely upon it, and states further: "The aforesaid board of naval experts, under the direction of the Secretary of the Navy, passed upon the expense to which the contractors had been put on account of this verbal order of the Secretary of the Navy." It will thus be seen that there is absolutely nothing in the findings which for a moment suggests that the question of damages resulting to the contractors on account of any delay caused

by this order of the Secretary of the Navy was ever submitted to this board of experts for determination. They only passed upon the actual cost incurred by the contractors in obeying this order.

In this item, and in the item set out in Finding XI, we are not asking the court to transmute a contract into a statute of frauds, as is argued by counsel, but only that the courts enforce a lawful contract according to its terms, enforce it as the parties to it have drawn it, not to rewrite it under the guise of interpretation. We plead for the sanctity of contracts. "If the contract as written did not express the intention of the parties, it was the claimants' folly to have signed it." (*Brawley* v. *United States*, 96 U. S., at p. 173, quoted with approval in *Simpson* v. *United States*, 172 U. S., at p. 379.)

In speaking of the act of 1862 (12 Stats., 411, now Revised Statutes, section 3744) this court, in *Clark* v. *United States* (95 U. S., at p. 542), said:

> The Court of Claims has heretofore held this act to be mandatory and as requiring all contracts made with the Departments to be in conformity with it. The arguments by which this view has been enforced by that court are of great weight, and, in our judgment, conclusive. The facility with which the Government may be pillaged by the presentment of claims of the most extraordinary character if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the Govern-

ment must be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves and prevent them from making reckless engagements for the Government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make contracts in any other way than by writings signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. *A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law.* We are of opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect.

It is true that the court adds at the conclusion of this the following:

> We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value

of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*.

If it be conceded that this doctrine has application to a parole modification of a written contract by the consent of the parties, yet it could have no application unless such parole modification was made or assented to by the parties making the contract. In the case at bar the parole modification sued upon was not made by the Chief of the Bureau of Yards and Docks, but by the Secretary of the Navy. The Secretary of the Navy is not a party to this contract and had no more authority to depart from its terms by parole agreement than the merest stranger. His authority to do so, and consequently the voidness of his promise, is as great as was that of the Secretary of the Interior in the case of Stansbury (8 Wall., 33) or the engineer in charge in the case of Hawkins (96 U. S., 689).

VII.

BYRON BARLOW & CO., APPELLANTS,
v.
THE UNITED STATES, APPELLEES. } No. 128.

AS TO THE ITEMS DISALLOWED BY THE COURT BELOW IN FINDINGS VIII AND X.

These items are as follows:

Finding VIII.

The plans for the foundations of the boilers and boiler house were submitted to the engineer in charge of the work and approved by him, and the work was then done on said foundations

in accordance with the directions of said engineer. The foundation for the boiler house was completed and accepted by said engineer and included in his monthly estimate and paid for. The foundations for the boilers were made in accordance with the drawings so submitted to said engineer, and were completely laid at about the time the engineer first in charge of said work was detached therefrom. Subsequently another engineer was placed in charge of the work. In his opinion the foundations were imperfect and insecure because of defective construction on the part of the claimants, and he required that they be relaid. The claimants, protesting that it was not competent to require them to change the foundations after they had laid the same to the acceptance of the engineer in charge at the time of the original construction, relaid the same in accordance with the direction of the engineer thus subsequently in charge. The matter was subsequently referred to the Chief of the Bureau of Yards and Docks, and he decided that the work was required to be done by the terms of the contract. It does not appear that the claimants appealed to the Chief of the Bureau before doing the work or that it was ordered by him.

Finding X.:

In refilling the dirt after the altars were in place no part of the filling was rammed or sluiced except the clay puddling. This was in accordance with the instructions of the engineer in charge of the work. The claimants discussed

the matter with him and he informed them that it was not required to be rammed or sluiced. He embraced the work done in that way in his monthly estimates and the claimants received payments for a large portion of the work done in that way and at the contract rate of 30 cents per cubic yard. In the latter part of August, 1894, however, there was a change in the office of engineer in charge of the work for the United States. The new engineer then placed in charge required the claimants to ram and sluice all back fillings. The claimants protested, insisting that the contract did not require anything more than depositing the material and evenly grading the surface to correspond with the grade of the station. The new engineer, however, required all the work to be thoroughly sluiced with water and all but a small part thoroughly rammed, and the claimants did the work in that way under protest. The additional cost to the claimants of doing this work over and above what would have been required had they not been required to ram or sluice the same, would be 10 cents a yard, making, for 37,227 yards, $3,722.70. The engineer who ordered the work to be done in the manner stated referred the question of so requiring it, at the request of the claimants, to the chief of the Bureau of Yards and Docks, and the latter informed said engineer that the Department approved his requirement, for the reason, as shown by the Bureau, that the contract plainly required it.

The disallowance of these items by the court below was plainly correct for many reasons.

1. They are "doubts or disputes as to the meaning or requirements of the contract," which were actually submitted to the decision of the chief of the Bureau of Yards and Docks in conformity to paragraph 14 of the contract (Transcript, pp. 21, 22), and concerning which that officer has made his award or decision. For the reasons and upon the authorities given in Division I of this brief the decision of the chief of the Bureau of Yards and Docks upon these questions was final and conclusive upon all the parties. It ousted the jurisdiction of the courts and no suit is maintainable upon the original cause of action. The claimants can not maintain an action for the damages here claimed for except by a suit to set aside the award of the arbitrators upon the ground of actual or constructive fraud. This has not been done, and no allegation of fraud or even mistake appears in the pleadings or in the findings the court.

It does not appear from the findings of the court below whether the contractors exercised the right of appeal to the Secretary of the Navy which is given to them by the fourteenth paragraph of the contract or not. But if they did not, it was no one's fault but their own. The contract makes the decision of the chief of the Bureau of Yards and Docks final and conclusive in the absence of an appeal to the Secretary of the Navy. If the claimants waived their right of appeal to that officer, then they must abide by the decision of the chief of the Bureau.

2. Because the work described in these two findings

was plainly required by the provisions of the contract and specifications (see Transcript, pp. 16, 18, 23, 24) requiring the work to be done of the most approved materials, in a thoroughly substantial and workmanlike manner and to the complete satisfaction of the Chief of the Bureau of Yards and Docks, whether the same was shown in detail upon the plans and specifications or not. The fact that this imperfect and worthless method of construction was approved by the engineer first in charge of this work was entirely unavailing to the contractors, for in the first paragraph of the contract it is expressly provided that said dock shall be constructed in accordance with the plans and specifications, "subject to the approval of the civil engineer or such other competent officer or person or persons as may for that purpose be designated by the party of the second part; it being further mutually stipulated and agreed that the officer or officers, person or persons thus designated shall and may, from time to time during the progress of the work, inspect all material furnished and all work done under this contract, with full power to reject any material or work, in whole or in part, which he or they may deem unsuitable for the purpose or purposes intended, or not in strict conformity with the spirit and intent of this contract and with the aforesaid plans and specifications, and to cause any inferior or unsafe work to be taken down by and at the expense of the contractors, and that all such rejected material shall be at once removed from the station and replaced by materials satisfactory to such inspectors, and that all such

inferior or unsafe work shall be replaced by satisfactory work by and at the expense of the contractors."

Under the provisions of this contract, therefore, if the Navy Department deemed Mr. White, the original engineer in charge of this work, not sufficiently skillful or not sufficiently possessed of technical knowledge to properly superintend the same and supplanted him by another engineer who, in the judgment of the Department, possessed superior skill, judgment, and ability, the contractors were obligated to take down work which the second engineer deemed defective or to replace materials which the second engineer deemed unsuitable. This work was not required of the claimants as extra or additional work, but was required of them as work plainly called for by the contract in order to supply a good and workmanlike job; and when the engineer found that the concrete masonry for the foundations of the boiler was settling inside of the boiler house, and that well-defined cracks had appeared near the northeast corner, and owing to the fact that the material behind the altar walls had not been rammed and sluiced, that said material was settling out of grade, it was plainly within his authority to require the claimants to alter this defective plan of construction so as to remedy these defects. It needs no expert knowledge for us to know that if the earth behind the altar walls of a great structure like a dry dock is not properly rammed or sluiced in course of time the earth will settle behind said walls, causing great pressure against them,

allowing the surface water to drain through and under the sides and bottoms and eventually disintegrate the walls to such an extent as to threaten their utter destruction.

3. Even if these claims could in any proper sense be regarded as extra work, recovery for them would be impossible under the provisions of the seventh paragraph of the contract (Transcript, p. 18), which provides that no omissions in the plans or specifications or of any detail necessary to carry this contract into full and complete effect shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractors, and all claims for extra compensation by reason of or for or on account of such extra performance are hereby and in consideration of the premises expressly waived; and it is further provided and made the express condition of the contract that the plans and specifications shall not be changed in any respect except upon the written order of the Bureau of Yards and Docks, and that if at any time it shall be found necessary to make any change or modifications in the plans or specifications, then it could only be done when the same had been agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change and the estimated actual cost thereof, which the contractors should receive, and under the further proviso that if such change should operate to increase or decrease the total cost of the dock by the sum of $500 then the actual

cost thereof should be determined by a board of naval officers appointed for that purpose as to the amount of increased or diminished compensation which the contractors were to receive, and further providing that no payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred and until after its approval by the Chief of the Bureau of Yards and Docks.

In this respect, therefore, the case is identical with the decisions of the Court of Claims in the cases of *Ferris* v. *United States* (28 C. Cls. R., 332) and *Simpson* v. *United States* (31 C. Cls. R., 217).

In the Ferris case the contract contained a provision similar to the one in the case at bar, and was a contract for the dredging of a channel of the Delaware River, and for the removal of the material thus dredged, which said material was advertised to be of sand, mud, and gravel, the advertisement and specifications being made a part of the contract, which provided that any change or modification which would increase or diminish the cost must be agreed upon in writing by the contracting parties and approved by the Secretary of War. Shortly after the beginning of the work the contractor ascertained that the material to be excavated from said river did not wholly consist of sand, mud, and gravel, as described in the advertisement for proposals and in the contract, but consisted in fact of sand, gravel, and bowlders, some of the latter weighing from 100 pounds to 3 tons, and amounting in all to over

30 per cent of the entire work, which thereby immensely increased the cost of doing the work. Upon making this discovery the contractor went to the engineer in charge, who referred him to the assistant engineer, who, upon the contractor representing that he must have extra pay or would quit the work, promised it to him and the contractor, relying upon this promise, went on and did the work and brought his suit to recover said extra compensation. The case was defended upon the ground that no such compensation could be paid unless, except and until supplementary agreements in writing had been made in accordance with the provisions of the contract, and the Court of Claims sustained this contention, reviewing all the authorities on this subject, and holding to the integrity of the written contract, saying:

> When it was ascertained by the claimant that the material contemplated by the contract was essentially different from the material to be dredged, it was his duty if he did not wish to proceed with the execution of the work to so notify the officer with whom he contracted and to get from him by the sanction of the proper parties such change as could be agreed upon.

In the *Simpson case* (*supra*) (which was affirmed by this court upon appeal, 172 U. S., 372) there was a contract for the construction of a dry dock at the navy-yard at Brooklyn, and the contract contained a provision precisely similar to that which is contained in the contract at bar. In that case the specifications provided that the contractors shall build a dock "upon an

available site to be provided by the Government." During the progress of the work it transpired that the site selected by the Government for this purpose contained large pockets of quicksand, so that the work was submerged almost as fast as done, and claim was made that there had been a breach of contract by the Government in its failure to provide an available site, and, *inter alia*, demand was made for the extra cost of the additional material and labor furnished in and about the reconstruction of the work which had been submerged by the action of the quicksand. Among other points the court decided that there could be no recovery thereon because the cost thereof had not been ascertained and the contract therefor reduced to writing, as required by the contract, and the court said that the case did not differ in principle from that of *Ferris* (*supra*), which it cites with approval.

See in accord, *Dale's case* (14 C. Cls. R., 533), *Kennedy's case* (24 C. Cls. R., 144), *Elridge* v. *Fur* (50 Mo. App., 144).

It is therefore submitted that the judgment of the court below, disallowing the claims set up in Findings VIII and X, should be affirmed, and that the judgment of the court below on all other items in the petition should be reversed with instructions to dismiss the petition.

GEORGE HINES GORMAN,
Special Attorney.

L. A. PRADT,
Assistant Attorney-General

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANTS, *v.* BYRON BARLOW, JAMES E. BLACKWELL AND James M. Dugan, partners, as Byron Barlow & Co.	No. 127.
BYRON BARLOW, JAMES E. BLACKWELL AND James M. Dugan, partners, as Byron Barlow & Co., appellants, *v.* THE UNITED STATES.	No. 128.

ANSWER TO MOTION OF APPELLANTS FOR MODIFICATION OF JUDGMENT.

The motion in this case seeks a revision of the judgment and opinion of the court filed February 24, 1902, to the extent of having allowed to the appellants the sum of $3,967.60, being the amount found by the court below to be the value of the Tenino stone quarried but not delivered.

The decision of the court manifestly proceeded upon the theory that the engineer in charge could not by the acceptance of a sample accept the product of a stone quarry in advance for use in the ashlar of this

dock. The allowance of the value of the stone which was quarried and delivered upon the site of the dock was upon the theory that such stone had been actually inspected by Mr. White, the engineer, and by him actually accepted. There is no finding in the record whatever which supports the notion that the stone, which had been quarried but not delivered upon the site of the dry dock, had ever been actually seen or actually inspected or actually accepted by Mr. White. To allow any payment for it would be subversive of the fundamental principles involved in the decision of this case, for if his implied acceptance of this stone is to be binding upon the Government, then his implied acceptance of the total product of the quarry would be equally binding, and the result would be to subvert the principle of the decision, to wit, that no acceptance on the part of Mr. White was binding upon the Government until the actual stone to be used had been inspected and accepted, and that Mr. White could not accept the product of a stone quarry in advance.

In addition the attention of the court is further directed to page 36 of the transcript and to the statements contained in Finding VII (Transc., p. 42), wherein it is found that Messrs. Byron, Barlow & Co. have never paid any sum of money whatever to the owners of the Tenino stone quarry for this stone, and that no action or suit has ever been brought against them by the owners of said quarry. This money, therefore, does not represent any actual outlay on the

part of the claimants; and manifestly if they are permitted to recover from the United States in this action they could only do so as trustees for the benefit of the Tenino stone quarry.

Turning now to the contract between the Tenino stone quarry and the appellants (Rec., p. 36), it will be observed that the appellants were to pay nothing for this stone unless, except, and until said stone was accepted and approved by the United States, and that even when so accepted and approved, and even when actually used, was not to be paid for until the claimants had received their pay from the United States. There was, therefore, no liability on the part of the appellants to pay for any sandstone which in fact was not accepted and paid for by the United States; and inasmuch as none of this stone was accepted or paid for by the United States, but, on the contrary, was repudiated and refused, it follows that under this contract between the claimants and the Tenino Stone Company no cause of action exists in favor of the stone company against the appellants; and inasmuch as the claimants have never actually paid and never can be made to pay for this stone, no judgment in favor of the claimants can be rendered therefor against the United States.

Not only so, but there is nothing in this record to show as a matter of fact that this stone, which was quarried from the Tenino stone quarry a great number of years ago, has not actually been sold by the owners of the Tenino stone quarry to other persons and for

other purposes. The quality of this stone has been highly praised by the appellants and their counsel and their witnesses, and it is to be presumed, therefore, that it is a merchantable commodity, and if a merchantable commodity it has probably been sold by its owners long ere this for a price as great and perhaps greater than that which was to have been paid for it by the appellants.

It is submitted that the motion should be overruled.

GEORGE HINES GORMAN,

Special Attorney.

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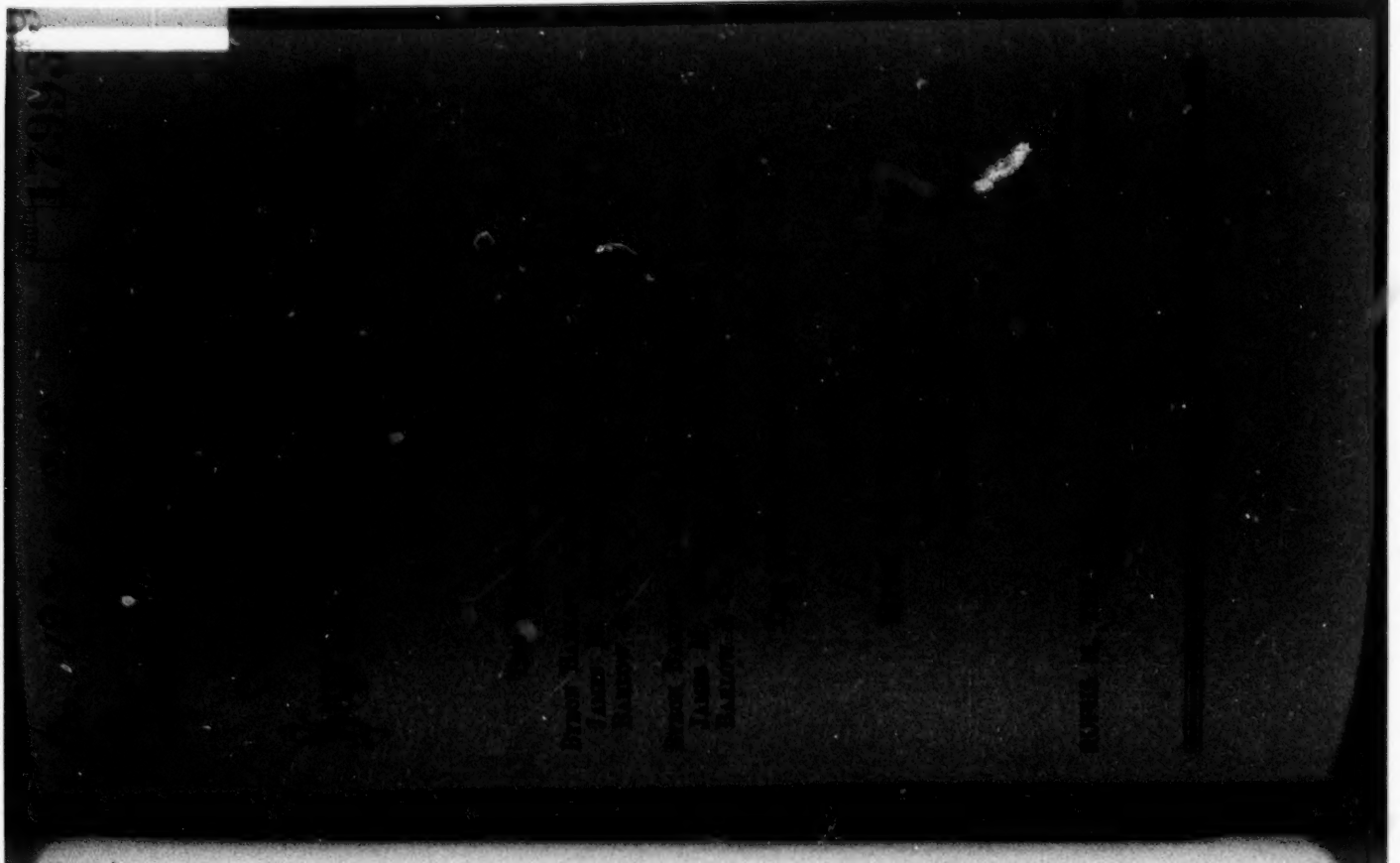

IN THE

Supreme Court of the United States.

October Term, 1901.

THE UNITED STATES, *Appellant*, v. BYRON BARLOW, JAMES E. BLACKWELL and JAMES M. DOUGAN, partners as BYRON BARLOW & CO.	No. 127.
BYRON BARLOW, JAMES E. BLACKWELL and JAMES M. DOUGAN, partners as BYRON BARLOW & CO. *Appellants*, v. THE UNITED STATES.	No. 128.

BRIEF FOR BYRON BARLOW *ET AL.*

I. Statement of the Case.

Nature and History of the Suit.

This case comes before this court by cross appeals from a judgment of the Court of Claims, which awarded to the claimants the sum of twenty-four thousand nine hundred and forty-two dollars and ninety-nine cents ($24,942.99).

The suit arises out of the construction by the claimants of a dry dock at Puget Sound, in the State of Washington, under contract between them and the government, dated October 29, 1892 (Record, pp. 15–22). The price fixed in the contract (p. 20) was four hundred and ninety-one thousand four hundred and sixty-five dollars ($491,465).

The greater part of the claim was brought before the

court by voluntary petition of the claimants (pp. 8–14). One item, however, amounting to one thousand one hundred and fifty-six dollars and seventy-six cents ($1,156.76), was referred by the Secretary of the Treasury under Revised Statutes, section 1063 (p. 1), and was made the subject of a separate petition (pp. 1–8). The two cases were consolidated for trial (p. 15). The findings of fact, opinion and judgment deal with the claim in its entirety.

Change of Sandstone.

The principal item which formed the subject of controversy in the Court of Claims, and which gives rise to the appeal of the United States to this court, arises out of a change of the stone required for the ashlar of the dry dock.

Ashlar is defined by the Oxford Dictionary as "Masonry constructed of square, hewn stones; opposed to rubble work."

On this point the specifications, which form a part of the contract (pp. 22–33), provided, under the head of "Stone Masonry," as follows (p. 30):

"The ashlar must be of granite or sandstone, of quality approved by the engineer. All stones must be hard, clean, and free from seams and imperfections, and of good bed and build. They must be laid true on their natural beds, and without pinning."

The Court of Claims finds in regard to the stone (Finding IV, pp. 34, 35):

"At the inception of the building of this dock certain sandstone, known as Tenino sandstone, was submitted by the contractors to the defendants' civil engineer in charge of said work, and was by said engineer accepted as a suitable and proper stone for use in said dry dock, under that clause of the specifications that 'the ashlar must be of granite or sandstone of quality approved by the engineer.' The claimants had submitted two such

bids. The first of these, based on the use of sandstone, was much the lower and was accepted.

"From the beginning of work under the contract until the 29th of August, 1894, when a large portion of the same had been completed, U. S. G. White, civil engineer, United States Navy, was the engineer in charge of the work on behalf of the government. Shortly after the inception of work the claimants tendered to him a sample of sandstone which they stated they proposed to use in the ashlar of the dry dock. They at the same time offered to exhibit to said engineer the quarry from which said stone was taken. In pursuance of this offer said engineer, early in the spring of 1893, visited said quarry, which was situated at Tenino, in the State of Washington, in order to inspect the same and to learn therefrom whether its stone was suitable for use in the dry dock construction. He there found a quarry open from 300 to 400 feet along the ledge and faced about 40 feet in depth and equipped with proper appliances for taking the stone out and working it. He made a careful examination of the face and satisfied himself as to its uniformity and freedom from sand, mica, and clay pockets and pebbles or bowlders; noted the reaction of the stone under the channelers then in operation; visited the work where the stone was being sawed to dimensions, and noted the reaction under the saws; noted carefully the abrading power of the stone when used as a grindstone; took hand tools and tried the stone; examined unused blocks of the stone that had been exposed to the weather for a long time to detect any signs of disintegration or deterioration from such exposure; visited the boiler-room of the works and examined the stone which was in use as lining to the furnaces under the boilers that supplied power for the works, and found no evidences of any breaking down or disintegration from the heat to which the stone had been and was being subjected; made numerous examinations with a glass magnifying 6 or 8 diameters, looking to the detection of any mica or other substances in its composition, and found none, the texture appearing uniform and good under the glass, and he subsequently made a test to determine the percentage of absorption.

"As the result of this examination he approved the sandstone from the Tenino quarry and informed the claimants that the same would be accepted for all work under the contract.

"Tenino sandstone had in fact been used as a lining in the fire box of the boilers at the Tenino quarry for some time; also in the piers of a bridge over the Chehalis River, on the Northern Pacific Railroad, where it was exposed to the action of salt water, and had been so for a number of years without deterioration, and had also been used with success in a number of buildings in western Washington and Portland, Oreg., some of them very high ones.

"Shortly after this examination, to wit, on the 4th day of May, 1893, the claimants, relying upon the assurances thus given by the engineer that stone from the Tenino quarry was approved and would be accepted, entered into a contract with the owners of the quarry to furnish them from said quarry all of the sandstone required for the work."

This contract is set forth in full (p. 36).

It is also found (p. 37):

"Afterwards, and on the 28th day of June, 1893, they entered into a contract with Albert and Louis Beaudette, stonecutters, to cut the stones.

"Thereafter a carload of stone was furnished by the owners of said quarry under their contract, which arrived at the site of the dock on or about the 20th of June, 1893. The amount of this stone, 2,377 cubic feet, at 65 cents per foot, $1,545.05, was included in the vouchers rendered by the claimants in the month of June, 1893."

These vouchers were certified by the civil engineer in charge of the construction of the dry dock, and approved by the commandant of the Navy Yard.

It is also found (p. 37):

"Said voucher was forwarded July 8, 1893, by the commandant at Puget Sound Naval Station, Lieut.-Commander John C. Morong.

"The item for stone was, however, stricken out of the voucher, at the Bureau of Yards and Docks, Navy Department, and the total amount of the voucher was thus reduced to the sum of $12,741.03.

"This action of the Navy Department originated in the receipt by that Department of a communication from a labor organization, the Tacoma Trades Council, of the State of Washington, complaining of the quality of the stone.

"The Department, upon receipt of this complaint, called upon the commandant of the Puget Sound Naval Station for a report on the quality of said stone. He in turn called for a report from the engineer in charge, who reported favorably on the quality of said stone, accompanying his report with letters from the chief engineer of the Northern Pacific Railroad and others acquainted with the use of said stone, and his report was adopted as his own by the commandant of the Puget Sound Naval Station and was forwarded to the Navy Department."

Correspondence followed, in which the claimants maintained the good quality of the stone furnished, and insisted that the complaint against the same originated in labor union troubles (Findings IV, V, pp. 37–41).

It is also found (Finding VI, pp. 41, 42):

"When the attention of the Bureau of Yards and Docks was called to the alleged unfitness of this stone for the purposes required, the Navy Department, through the Chief of the Bureau of Yards and Docks, instituted an examination and inquiry for the purpose of determining the chemical ingredients, geological formation, the tensile strength, the porosity, the crushing strength, and the absorbent qualities of the said Tenino sandstone, and to this end a number of experiments, tests, and observations were had at the bureau of medicine and hygiene at the Watertown Arsenal and at other scientific places by officers in charge of scientific institutions and persons skilled and learned in their respective professions, with the result that said Navy Department, through the Chief of the Bureau of Yards and Docks, reached the conclusion that

said Tenino sandstone was not fit and suitable for the purposes to which it was proposed to use said stone; that said stone did not fulfill the requirements of the contract and specifications as above recited; that it was not a hard stone, nor a clean stone, nor free from imperfections; that its absorbent qualities were too high; that its crushing strength was too low, and that it was in many essential particulars totally unfit and unsuitable and undesirable for the use in the ashlar of this dry dock; and thereupon, to wit, on the 29th day of August, 1894, the contractors were notified of this decision of the Bureau of Yards and Docks and were required to furnish other and better sandstone. From this decision of the Chief of the Bureau of Yards and Docks the claimants appealed to the Secretary of the Navy, who concurred in the opinion of the said Chief of the Bureau of Yards and Docks, and concurred in his order requiring a different and better sandstone. The tests and analyses of said Tenino sandstone were made from samples furnished to the Bureau of Yards and Docks by the contractors and by the commandant of the Puget Sound Station. The delay in arriving at the ultimate determination to require a better quality of sandstone, which was reached on the 24th of August, 1894, was partly caused by the fact that the claimants were in correspondence with the Secretary of the Navy in an endeavor to persuade him to accept said Tenino sandstone. The tests and analyses of said stone, as above recited, were made promptly."

"Upon being notified by the Navy Department that the Tenino sandstone would not be accepted, the claimants—protesting against such requirement—offered stone from Sucia Island and also from Dog Fish Point, which was accepted and used in the construction of the dock" (Finding V, p. 41).

It is also found (Finding VII, p. 42):

"The amount of Tenino sandstone quarried, cut and delivered was 2,349 cubic feet, amounting, at 65 cents a cubic foot, to $1,526.85.

"The claimants had also, before receiving notice of the

rejection of the Tenino sandstone by the Bureau of Yards and Docks, caused to be quarried and cut, but not transported, 7,280 cubic feet, amounting, at 65 cents a foot, less the cost of transportation, 10½ cents a foot, 54½ cents a foot, to $3,967.60, making a total for stone actually quarried and cut, and part of which was delivered, of $5,494.45. That sum, however, has not been paid by the claimants to the owners of the said Tenino stone quarry, nor does it appear that any action or suit has ever been brought against the said claimants for said sum of money.

"The total amount expended by the claimants for furnishing, delivering, and cutting the stone which actually went into the construction of said dry dock from Sucia Island and Dog Fish Point, as aforesaid, was $33,556.23.

"If they had been allowed to furnish Tenino stone they could have done so at a cost of $17,948.80. The additional cost, therefore, to the claimants of furnishing the stone which they did furnish, over and above what it would have cost them to furnish the Tenino stone, is the difference between the two sums last named, amounting to $15,607.43."

The claim arising out of the acceptance of Tenino stone by the engineer in charge and its subsequent rejection by the Department, as above set forth, forms the largest item involved. Upon it the judgment of the Court of Claims was in favor of the claimants.

Other Items.

The remainder of the claim arises out of requirements made from time to time upon the claimants for the performance of certain work in connection with the construction of the dry dock. It was and is maintained on the part of the United States that the performance of the work named in these items was required by the terms of the contract, while on the part of the claimants the contention is that it was extra work for which they are

entitled to be paid a reasonable price and, in the case of one of the items, damages for delay.

The claim set forth in Finding VIII (pp. 42, 43) is for tearing out and relaying foundations for the boilers and boiler-house, amounting to $696.68. This item was disallowed by the Court of Claims.

Finding IX (p. 43) relates to a claim for putting in a concrete toe to protect the piles at a certain point. This work was required by the Navy Department apparently on the ground that the necessity for it was due to a mistake made by the claimants in the construction of the piling. It is found, however, by the Court of Claims that it had no relation to that error, but would have been required irrespectively of any such error having been made. It amounts to $59.35. This item was allowed by the Court of Claims.

Finding X (pp. 43, 44) relates to a claim for the extra cost of ramming and sluicing the fillings of dirt behind the altars, one engineer not having required the contractors to do the work in that way while a subsequent engineer, acting upon a different view and with the approval of the Department, required it to be done. This additional cost amounted to three thousand seven hundred and twenty-two dollars and seventy cents ($3,722.70). This item was disallowed by the Court of Claims.

Finding XI (pp. 44, 45) relates to certain work done by the contractors under direct order of the Secretary of the Navy personally on the work in sinking piles by a method known as the water jet system. The circumstances are fully set forth in the finding. The value of the work amounts to one thousand one hundred and fifty-six dollars and seventy-six cents ($1,156.76). All of this amount was recommended by a board of engineers, whose findings were approved by the Secretary of the Navy, but the

Comptroller of the Treasury refused to allow the payment. The claim was thereupon at the request of the Secretary of the Navy referred by the Secretary of the Treasury to the Court of Claims under Revised Statutes, section 1063. This item was allowed by the Court of Claims.

Finding XII (p. 45) relates to the expense caused to the claimants by the delay incident to the experimentation with the water jet referred to in the last finding. This expense amounts to two thousand six hundred and twenty-five dollars ($2,625). The board of engineers referred to in the last finding reported as its opinion that the contractors were equitably entitled to a reasonable compensation for this expense, although they declared that they were unable to find from the evidence before them what that expense was. The Court of Claims allowed the amount found by it to be the expense incident to the delay.

Conclusions, Opinion and Judgment.

The court decided as conclusions of law (p. 46):

"I. The claimants should recover upon the subject-matters set forth in Findings VII, IX, XI, and XII the sum of $24,942.99.

"II. The claimants should not recover upon the subject-matters set forth in Findings VIII and X."

An elaborate opinion was delivered by Mr. Chief-Justice Nott (pp. 46–52). It concludes as follows:

"The causes of action set forth in Findings VII, IX, XI, and XII are sufficient, in the opinion of the court, to entitle the claimants to recover. As to the causes of action set forth in Findings VIII and X, the court is of the opinion that the claimants should have submitted the requirements of the engineer in charge to the Chief of the Bureau before proceeding with the work. They

were required to do so by the terms of the contract, and authority to compel them to do additional work was thereby reserved to the Chief of the Bureau.

"The judgment of the court is that the claimants recover of the defendants $24,942.99."

Judgment was on May 21, 1900, entered (p. 52) in accordance with the findings, conclusions and opinion of the court in favor of the claimants for twenty-four thousand nine hundred and forty-two dollars and ninety-nine cents ($24,942.99). From this judgment the United States, on June 11, 1900, took an appeal (p. 52). The claimant thereupon, on the same date, took a cross-appeal (pp. 52, 53) from so much of the judgment as disallows the amounts stated in Findings VIII and X. The case is reported, 35 Court of Claims, 514–552.

II. Assignment of Errors.

The claimants hereby assign the following errors in the conclusions of law and judgment of the court:

1. Said court erred in disallowing the items named in Finding VIII (pp. 42, 43), for extra foundations for boiler-house and boilers, amounting to six hundred and ninety-six dollars and sixty-eight cents ($696.68), and in failing to include the same in its judgment.

2. Said court erred in disallowing the item named in Finding X (pp. 43, 44), for ramming and sluicing the fillings behind the altars, amounting to three thousand seven hundred and twenty-two dollars and seventy cents ($3,722.70), and in failing to include the same in its judgment.

III. Brief of Argument.

The Issues.

The entire amount in controversy in this case upon the findings of the Court of Claims is twenty-nine thou-

sand three hundred and sixty-two dollars and thirty-seven cents ($29,362.37). Of this amount the court allowed the sums set forth in Findings VII, IX, XI and XII, aggregating twenty-four thousand nine hundred and forty-two dollars and ninety-nine cents ($24,942.99), and disallowed only those set forth in Findings VIII and X, amounting to four thousand four hundred and nineteen dollars and thirty-eight cents ($4,419.38). The claimants, although cross-appellants, are, therefore, in substance seeking an affirmance of the judgment. This is particularly true with regard to the portions of the claim to which the opinion (pp. 46–52) is almost wholly devoted. The cross-appeal of the claimants seeks only an allowance of two comparatively small items disallowed by the Court of Claims.

Who was Authorized to Determine the Quality of Stone?

The principal controversy relates to the construction of that portion of the specifications annexed to the contract which provides (p. 30) "The ashlar must be of granite or sandstone, of quality approved by the engineer."

What engineer is here referred to?

It is insisted on the part of the claimants that this expression relates to the engineer of the Government placed locally in charge of the construction of the work.

The contract itself in article first (p. 16), being the general provisions of the contract binding the contractors to furnish all the labor, materials, etc. for the construction of the dry dock, provides that they shall perform the same (p. 16) "in accordance with the aforesaid plans and specifications, subject to the approval of the civil engineer, or such other competent officer or person or persons as may for that purpose be designated by the party of the second part."

Such engineer is again referred to in the same paragraph of the contract (p. 17) as follows:

"It is further mutually stipulated and agreed that at and upon the request of the civil engineer, or other officer in charge, any disorderly, careless, or incompetent person or persons employed by the contractors, in or about the work to be done under this contract, shall be at once discharged and not again employed therein."

And again, by paragraph second of the contract (p. 17), the contractors bind themselves to give their personal supervision and attention to the work, and in case of their absence to have a competent representative or foreman present, "and to receive and follow directions relating thereto when given by the civil engineer, or other officer in charge."

Also, by paragraph third (p. 17):

"On the completion of the work the surroundings shall be thoroughly cleaned up, filled, and graded to the established level or levels of the station as the civil engineer, or other officer in charge, may direct," etc.

This view is the one accepted by the Court of Claims.

On the part of the United States it is claimed that this provision is controlled and, so far as this particular question of the approval of the stone is concerned, overridden by the provision contained in paragraph fourteenth of the contract (pp. 21, 22), which is as follows:

"*Fourteenth.* It is expressly understood, covenanted, and agreed, by and between the parties to this contract, that if any doubts or disputes as to the meaning or requirements of anything in this contract, or if any discrepancy appear between the aforesaid plans and specifications and this contract, the matter shall be at once referred for the consideration and decision of the Chief of the Bureau of Yards and Docks, and his decision thereon shall be final, subject, however, to the right of the con-

tractors to appeal from such decision to the Secretary of the Navy, who, in case of such appeal, shall be furnished by the contractors with a full and complete statement of the grounds of their appeal, in writing, and shall thereupon take such action in the premises as, in his judgment, the rights and interests of the respective parties to this contract shall require, and the parties of the first part hereby bind themselves and their heirs and assigns, and their personal and legal representatives, to abide by his, the said Secretary's, decision in the premises."

In view of the fact that both the contract (pp. 15–22) and the specifications (pp. 22–33) contain numerous provisions referring respectively to the engineer, to the Bureau of Yards and Docks and to the Secretary of the Navy, it would be unreasonable to hold that, when one was named as the officer to exercise judgment on a particular subject-matter, some one of the others was meant. An examination of these several provisions shows that the subjects upon which the engineer was to exercise a judgment related to the quality of particular materials or work, which could best be judged by some one on the ground; while the subjects of which the Bureau of Yards and Docks was to judge, such as the amount of insurance required (paragraph fifth, p. 17), were of a general character, as to which the local judgment of some one having an opportunity for a daily view of the work was not so important.

The justice of this discrimination becomes all the more evident from the fact that the "specifications were prepared at the Bureau of Yards and Docks of the Navy Department" (Finding II, p. 22), and not, as in the case of the Brooklyn dry dock, considered by this court in *Simpson* v. *United States*, 172 U. S. 372, by the contractors. They may, therefore, be presumed to have embodied the most careful judgment of the Department as to what was required. When they called for the judgment of the en-

gineer they must be regarded as having contemplated the judgment of the person locally in charge, who would have the best means of judging of the materials furnished and their adaptability to the purpose for which they were designed.

The Provision for Submission of Disputed Questions to the Navy Department.

This view is not at all in conflict with the provisions of the fourteenth article of the contract above quoted relative to "any doubts or disputes as to the meaning or requirements of anything in this contract," or "any discrepancy * * * between the aforesaid plans and specifications and this contract." The question of the quality of a particular stone and its suitableness for the purpose for which it was designed did not constitute a "doubt or dispute as to the meaning or requirements of anything in the contract," much less a "discrepancy between the specifications and the contract." What was required for the ashlar was "sandstone of quality approved by the engineer." No "doubt or dispute" arose between the claimants and the engineer as to the quality of the sandstone. His decision was in its favor. For the Bureau of Yards and Docks to undertake to pronounce upon the quality of the sandstone in opposition to the judgment of the engineer was to arrogate to itself a power vested by the contract in another authority. If, on the other hand, what was intended by the Bureau was not to override the judgment of the engineer *under* the contract, but to depart *from* the contract and order more expensive stone, not contemplated thereby, it must be conceded that to do so was within the power of the Department. But coupled with that power was a correlative obligation to pay to the contractors the additional expense thereby caused to them,

as for something not covered by and outside of the terms of the written contract.

The Court of Claims goes further and holds that if the fourteenth paragraph of the contract was intended as a universal submission of every question of fact and law arising under the contract to the sole arbitrament of the Secretary of the Navy, it must be held void, as against public policy and as ousting the jurisdiction of the courts of law over contracts. In support of this conclusion the court refers (pp. 47, 48) to the case of *Hurst* v. *Litchfield*, 39 N. Y. 377. The syllabus of that case is as follows:

"A stipulation in a written contract for building, etc. that, 'in case any question arises under such contract in relation to the work, both as to value of work added or deducted, the same shall be adjusted by the architect,' is not binding, being against the policy of the common law, and having a tendency to exclude the jurisdiction of the courts provided with ampler means to entertain and decide legal controversies."

Further quotations from that case are given in the opinion of the Court of Claims, and, as is said in that opinion (p. 48), "Many cases are cited, English and American."

In the case of *District of Columbia* v. *Bailey*, 171 U. S. 161, this court decided that the Commissioners of the District of Columbia have no authority to submit all the issues of fact and law in a claim against the District of Columbia to arbitration, and that an award based upon such submission and arbitration is void. It is true this was not done by virtue of any provision in the original contract, but there is no difference in principle. The officers of the United States have no more authority than those of the District of Columbia to submit claims to arbitration.

It may be questioned whether the parties intended

by this provision anything more than the adoption of a practical working rule under the contract, and not the determination of ultimate rights. Much hardship has occurred in the execution of contracts for public works through the fact that contractors who have furnished materials under their contracts have been required to depart therefrom by orders of subordinate officials without submitting the questions to the Department. The typical example of such a case is *Hawkins* v. *United States*, 96 U. S. 689, in which the Government got a much better wall than the contract called for. But this court held that the extra materials, not having been ordered by the responsible head of a department, could not be paid for. In this view the provision for a presentation of the questions involved to the Chief of the Bureau of Yards and Docks, subject to an appeal to the Secretary of the Navy, was probably intended to be conclusive only within the Department, and, so far from depriving the courts of jurisdiction, would supply the very element upon which any responsibility of the Government could properly be based, viz.: the action of the responsible head of the Department.

Besides, even if it be held that the quality of the stone was one of the questions upon which under paragraph fourteenth of the contract the Chief of the Bureau of Yards and Docks, and the Secretary of the Navy on appeal, had the right to pass, their action came too late.

It will hardly be denied that the civil engineer in charge had the right to decide that question in the first instance. The Department in the outset of the execution of the work under the contract expressly left the whole matter to his judgment. The Chief of the Bureau of Yards and Docks in a letter, dated June 30, 1893, to the Commandant of the Puget Sound Naval Station, among other things said (p. 39):

"In the further consideration of the matter the Bureau desires that it may be understood that it decides the contract and specifications to give to the engineer the decision as to the standard of quality, and he is fully authorized thereunder to fix upon the quality of sandstone he requires, by sample or otherwise, and require material equal to it."

The engineer made a most elaborate inspection of the stone and of the quarry whence it came, approved the sandstone, and informed the claimants that the same would be accepted for all work under the contract. The claimants afterwards entered into contract with the owners of the quarry for the stone, and with stonecutters to cut it. It was not until after all this had been done that the Department, acting upon the complaint of a mere intermeddler,—a trades council dissatisfied with the attitude of the claimants or their sub-contractors on the subject of union labor,—made its own examination, and reversed the judgment of the engineer in charge.

The judgment of the engineer in charge ought to be sustained, not only upon the ground that he was the authority, and the sole authority, under the contract to pass upon the quality of the stone, but upon the further ground that, if he were not, the power was delegated to him by the Bureau of Yards and Docks,—was exercised by him,—and important rights had become vested in the claimants and their sub-contractors before any action to the contrary was taken by the Bureau of Yards and Docks or by the Navy Department. No one seems to have assumed more completely than did the Navy Department itself the finality of the engineer's judgment on this subject until a controversy was started, not by any one having a legal interest in the contract, or its execution, or by citizens acting from motives of regard for the public welfare, but by outside persons, whose action in the matter constituted mere impertinence.

The Court of Claims distinguishes an agreement to submit all the questions of fact and law generally under a contract to arbitration from a stipulation to submit the decision of a particular question of fact, such as the measurement of quantities or the qualities of particular materials furnished, to the decision of a specified officer or other person. The latter class of provisions have always been upheld.

Decisions as to Ascertainment of Quality, Amount, etc. by Officer.

To some of the decisions made by this and inferior federal courts as to the effect of measurements, ascertainments, etc. by an officer in such circumstances we now ask the attention of the court. Some of these decisions also reach the fundamental question in this case as to who the officer is whose decision is intended by such stipulations as those found in this contract—whether it is the officer locally in charge, or some superior officer at a distance.

In *United States* v. *Shrewsbury*, 23 Wall. 508, there was a stipulation in an army transportation contract for a board of survey to examine the quantity and condition of the stores transported, with a view to fixing the compensation, liability for loss, etc. The court refers (p. 517) to the fact that "the points of delivery were in the wilds of the West" as supporting its conclusion that "The time and place of delivery were the time and place to ascertain the facts, and to put the evidence in an effectual shape"—thus making the view of the officer on the ground the conclusive one in a case of this character.

Kihlberg v. *United States*, 97 U. S. 398, was another case of an army transportation contract. Here the contract provided that the distance between certain points should "be ascertained and fixed by the chief quartermaster,"

etc. The court in the opinion by Mr. Justice Harlan says (p. 401):

"The parties, however, concurred in designating a particular person—the chief quartermaster of the district of New Mexico—with power not simply to ascertain, but to fix, the distances which should govern in the settlement of the contractor's accounts for transportation. The written order of General Easton to the depot quartermaster at Fort Leavenworth was an exertion of that power. He discharged a duty imposed upon him by the mutual assent of the parties. The terms by which the power was conferred and the duty imposed are clear and precise, leaving no room for doubt as to the intention of the contracting parties. They seem to be susceptible of no other interpretation than that the action of the chief quartermaster, in the matter of distances, was intended to be conclusive. There is neither allegation nor proof of fraud or bad faith upon his part."

And the conclusion reached was (p. 401):

"His action can not, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract."

Again, in *Sweeney* v. *United States*, 109 U. S. 618, the judgment of the Court of Claims was adverse to the claimant. The opinion, by Chief Justice Waite, says (p. 620):

"This judgment is affirmed on the authority of *Kihlberg* v. *United States*, 97 U. S. 398. It was provided in the contract that payment for the wall was not to be made until some officer of the army, civil engineer, or other agent, to be designated by the United States, had certified, after inspection, 'that it was in all respects as contracted for.' The officer of the army designated under this authority expressly refused to give the necessary certificate, on the ground that neither the material nor the workmanship were such as the contract required. The court below found that there was neither fraud, nor such gross

mistake as would necessarily imply bad faith, nor any failure to exercise an honest judgment on the part of the officer in making his inspections."

The opinion of the Court of Claims in the same case is reported, 15 Court of Claims, 400, and is by Judge J. C. Bancroft Davis. It is somewhat more elaborate than that delivered in this court, and reviews a number of cases, English and American (pp. 411–413). It seems that in the Court of Claims the claimant offered to show by original evidence that the wall was actually built in all respects according to the contract, but the court refused to allow such proof, or to make any finding on that point.

This case is in two respects stronger than the two just cited.

1. Not only does no fault, or negligence, or bad faith of any kind appear, but the findings affirmatively show the exercise of the utmost care on the part of the engineer in charge in the examination of this stone before he approved the same (Finding IV, p. 35).

2. While the court, as in the *Sweeney Case*, makes no direct finding of its own as to the quality of the stone, it does go so far as to find facts which lead to an irresistible inference that the stone was in all respects suitable for use under the contract. It finds (Finding IV, p. 35):

"Tenino sandstone had in fact been used as a lining in the fire box of the boilers at the Tenino quarry for some time; also in the piers of a bridge over the Chehalis River, on the Northern Pacific Railroad, where it was exposed to the action of salt water, and had been so for a number of years without deterioration, and had also been used with success in a number of buildings in western Washington and Portland, Oreg. some of them very high ones."

In the recent case of *United States* v. *Gleason*, 175 U. S. 588, the judgment of the engineer is repeatedly referred to as the important and, indeed, conclusive element of decision in such cases, and the result is stated (pp. 608, 609):

"Our conclusions are that, under a proper construction of the contracts in this case, the right or privilege of the contractors, if they failed to complete their work within the time limited, to have a further extension or extensions of time, depended upon the judgment of the engineer in charge when applied to to grant such extension and that no allegation or finding is shown in this record sufficient to justify the court in setting aside the judgment of the engineer as having been rendered in bad faith, or in any dishonest disregard of the rights of the contracting parties."

Kennedy v. *United States*, 24 C. Cls. 122, involved the precise question at issue in this case,—whether the decision of the engineer in charge, or of the bureau at Washington, was to control. It was held (p. 140) that—

"While the engineer in charge might take the opinion of the Chief of Engineers upon the expediency of extending the time, the fact that he did so did not abdicate his power under the contracts, but left inherent in him a discretion under that clause of the agreements."

While the judgment of the Court of Claims in that case was for a large amount, exceeding that rendered in the present case, the government rested content with the judgment, and took no appeal.

The decision of the Circuit Court of Appeals in *Ogden* v. *United States*, 60 Fed. Rep. 725, is based upon the same view. The court there says (pp. 726, 727):

"This particular work was in charge of a captain of engineers in the United States army. No referee more accessible, competent, or impartial, could be suggested

than such officer should have been. In the absence of fraud, or such gross error or mistake as would imply bad faith, his decisions must be upheld as conclusive on the appellants. The proof does not show fraud or such gross mistake in the action of this referee. That a court acting on the testimony in the record might have decided differently from the referee in the matter of the appellants' claim does not warrant the setting aside the decision of the engineer in charge of the work."

This decision points to the importance of the fact that the officer was "accessible,"—following, in this respect, *United States* v. *Shrewsbury*, 23 Wall. 508, 517, above quoted.

Stipulations of this kind in contracts are not peculiar to government work. In *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, a railroad construction contract provided that the company's engineer should determine in all cases the quantity of the several kinds of work to be done and the compensation earned by the contractor at the rates specified, and that his estimate should be final and conclusive. It was held that the contractor could not recover in opposition to the estimate of the engineer in the absence of fraud, or such gross mistake as necessarily implied bad faith.

Chicago & Santa Fe R. R. v. *Price*, 138 U. S. 185, presents the converse of the last case. There it was claimed by the railroad company that the estimates made by its own engineer were too large. The court said in answer to that proposition in language which might well be applied to the present case (p. 194):

"The only difference between that case and the present one is that the alleged mistakes of the engineer in the former were favorable to the railroad company, while in this case they are favorable to the contractors. But that difference can not affect the interpretation of the contract. In the present case the agreement was that the work

should be executed under the direction and supervision of the chief engineer of the railroad company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work should be determined, and 'whose determination shall be conclusive upon the parties.' Any decision of the chief engineer relating to the execution of the contract was to be 'binding and final upon both parties.' His measurements and calculations as to excavations were made 'final and conclusive.'"

In another case, *Elliot* v. *Missouri, Kansas & Texas Railway Co.* 74 Fed. Rep. 707, a railroad company questioned the judgment of its own inspector, but the Circuit Court of Appeals held that the count of railroad ties, which formed the subject of controversy in this case, as made by the inspector must be conclusive against the railroad, as it would have been conclusive in its favor had his decision been the other way.

Sub-Contracts.

The court of Claims in its opinion considers (pp. 51,52) a defense interposed by the United States arising out of the sub-contracts with the Tenino Stone Company, owners of the quarry (p. 36), and with Albert and Louis Beaudette, stonecutters, to cut the same (p. 37), and the fact that the owners of the quarry have not brought suit against the claimants for the value of the stone which they furnished (Finding VII, p. 42). In response to this suggestion the Court of Claims cites *Masterton* v. *Mayor of Brooklyn*, 7 Hill, 61, which holds that in a case like this the rights of sub-contractors are those of their principals. The Supreme Court of New York, in the opinion delivered by Chief Justice Nelson, afterwards a member of this court, said:

"The fact that these sub-contracts must ordinarily be entered into preparatory to the fulfillment of the princi-

pal one shows the injustice of restricting the damages, in cases like the present, to compensation for the work actually done and the item of materials on hand."

The execution of the contract and the incurrence of expenses by sub-contractors was in legal effect the same as if it had been done by the principal contractors. The claimants are entitled to treat the actions of sub-contractors as their own. The sub-contractors have no right to maintain an action like this, in their own names, for the damages they have sustained, as there is no privity of contract between them and the United States. The idea that the sub-contractors could, by bringing actions or recovering judgments against the principal contractors, claimants in this case, either enlarge or restrict the liability of the United States would be a legal solecism.

In *Chandler* v. *United States*, 17 C. Cls. 1, the Court of Claims applied this doctrine as a defense to a claim. The contractor there brought his action more than six years after he had incurred the expenses, but within six years after he had paid them. The court decided that the claim accrued when the expenses were incurred, and that the time of payment, or whether he had paid them at all, was immaterial. It said (p. 11): "His right to recover from the defendant was not contingent upon the payment of his own debts."

The presumption is that so far as items for expenses incurred or work done by sub-contractors are concerned this suit was brought and is being prosecuted for their benefit. Ample means exist in the law for the protection of their rights and for a recovery over against these claimants in case they are ultimately entitled to the money.

In *Hobbs* v. *McLean*, 117 U. S. 567, this court sustained a bill in equity against a government contractor, who

had recovered a judgment in the Court of Claims, in behalf of a partner whose name was not disclosed by the contract, but who had advanced the money to enable the contractor to execute it.

In *Price* v. *Forrest*, 173 U. S. 410, a receiver appointed by a State court for the benefit of creditors of a claimant against the Government was held entitled to receive from the United States an amount appropriated to that claimant by a special act of Congress.

All such remedies are open to sub-contractors as against the principal contractor. But they can not be heard in this proceeding, which was instituted and is prosecuted, as it necessarily must be, in the name of the principal contractors alone.

The action of the court, therefore, in allowing for the increase of cost in carrying out the contract, made necessary by the action of the Department in ordering a more expensive stone than had met the approval of the engineer as a suitable one for the work, was correct. Its judgment, so far as concerns that item, should be affirmed.

Extra Foundations for Boilers and Boiler-House.

The next item in dispute is one of six hundred and ninety-six dollars and sixty-eight cent ($696.68), for extra foundations for the boilers and boiler-house. The facts in regard thereto are contained in Finding VIII (pp. 42, 43) as follows:

"The plans for the foundations of the boilers and boiler-house were submitted to the civil engineer in charge of the work and approved by him, and the work was then done on said foundations in accordance with the directions of said engineer. The foundation for the boiler-house was completed and accepted by said engineer and included in his monthly estimate and paid for. The foundations for the boilers were made in accordance with

the drawings so submitted to said engineer, and were completely laid at about the time the engineer first in charge of said work was detached therefrom. Subsequently another engineer was placed in charge of the work. In his opinion the foundations were imperfect and insecure because of defective construction on the part of the claimants and he required that they be relaid. The claimants, protesting that it was not competent to require them to change the foundations after they had laid the same to the acceptance of the engineer in charge at the time of the original construction, relaid the same in accordance with the direction of the engineer thus subsequently in charge. The matter was subsequently referred to the Chief of the Bureau of Yards and Docks, and he decided that the work was required to be done by the terms of the contract. It does not appear that the claimants appealed to the Chief of the Bureau before doing the work, or that it was ordered by him."

Upon the ground stated in the last sentence this item was disallowed by the Court of Claims.

It will be observed that this item is not so much for the performance of extra work in the strict sense of that term as it is for doing twice what the contract required the contractors to do but once.

The foundations of the boiler-house and boilers were entirely completed and the former had actually been paid for under the terms of the contract allowing payment of all but the retained ten per cent. They had been inspected and approved by the engineer in charge. They were no more subject to be required to be relaid than could the claimants have been required after constructing the entire dock to take the same up and reconstruct it according to the changing views of new officers who might by that time have been placed in charge of it.

In *Dialogue* v. *United States*, 22 C. Cls. 196, the court makes the following remarks as to the authority of an officer ordering extra work (p. 204):

"The findings show that Naval Constructor Hartt was detailed on the 11th day of November, 1876, and from that time supervised and superintended the execution of the contract and directed from time to time what extra work should be performed by the contractor. Hartt became and was from the time of his detail the responsible and authoritative agent of the United States, and as such ordered and directed the claimant not only in the performance of the agreement as to the work specially provided by the contract, but also in the addition of such extra work as they might agree from time to time to attach to the original undertaking. It was a contemporaneous construction of the parties which determined and fixed the liability beyond the power of repudiation upon the part of either. *Scott* v. *United States*, 12 Wall. 444, and 7 Ct. Cls. R. 226; *Eastern Railroad Co.* v. *United States*, 20 Ct. Cls. R. 45."

If this is true as to extra work ordered, how much more is it as to the performance of the agreement as to the work provided for by the contract itself? If there can not be finality in such a case in the approval of the officer under whose direction each step is taken, no finality can ever be reached until the entire structure is completed and paid for, if even then.

As to the objection made by the Court of Claims to this item (p. 52) "that the claimants should have submitted the requirement of the engineer in charge to the Chief of the Bureau before proceeding with the work," it is with deference to the learned court submitted that the force of this objection is destroyed by the finding (p. 43) that "The matter was subsequently referred to the Chief of the Bureau of Yards and Docks, and he decided that the work was required to be done by the terms of the contract." Why was not a subsequent decision to this effect equivalent to one rendered to the same purport before the work was done? The authority was the same,

whether exercised before or after the performance of the work.

So the Court of Claims held in *Ford* v. *United States*, 17 C. Cls. 60, see particularly paragraphs VI and VII of the syllabus (p. 61), the former of which is as follows:

"VI. In applying the law of agency to the affairs of government, the courts have recognized the principle of ratification; and have held that ratification by the head of an executive department, or other responsible officer, will render an unauthorized contract effective and valid."

And the decision in that case was thus construed in the later case of *Haliday* v. *United States*, 33 C. Cls. 453, 464):

"In this connection it is not necessary to refer in detail to the findings on the question of the right of the claimants to recover for extra labor, because of the provisions of the contracts relating to the requirements of an agreement in writing and the direction and sanction of the officer having the superior power of directing the execution and completion of work. The items for which we allow in the conclusion of law and judgment were at the request or requirement of the officers or agents in the immediate direction of the work, and some of them by the sanction of the superior power, under circumstances indicating the good faith of the subordinates. The additions were necessary, as it was thought by those agents; the Government has received the value and benefit of them, which combination of circumstances brings the claim for extras within the spirit if not wholly within the letter of the case of *Ford* (17 C. Cls. R. 60)."

If the Chief of the Bureau of Yards and Docks had disapproved and repudiated the action of the engineer who ordered the relaying of these foundations, and had decided that the foundations as first laid were sufficient, a different question would be presented. It is submitted that this item should be allowed.

Concrete Toe to Protect Sheet Piling.

The next is a very small item stated in Finding IX as follows (p. 43):

"In the execution of the contract the claimants drove a line of sheet piling transversely across the brick discharge culvert at the end of the brick work. They then went on and drove the round piling forming the foundations for the brick work of the discharge culvert. In cutting off this round piling, however, they made a mistake and cut the piling off 32 inches below the point where it should have been. As soon as this error was discovered they reported it to the engineer, and suggested two methods of remedying the mistake. One was to start the brick work 32 inches lower than it was originally shown, and to carry up the excess of height of 32 inches in brick work. The other remedy was to build up with timbers on top of the piles according to the height where they had been cut off too low, and then start the brick work on top of the additional 32 inches of timber work. The Department accepted the latter plan and also required that they put in a concrete toe to prevent the teredo from attacking the sheet piling and timber work. The claimants put in the timber work as required, and made no charge for the same. They also put in a concrete toe, as required by the Navy Department. This concrete toe had no relation whatever to the error which had been made in the original construction of the sheet piling, but would have been required irrespectively of any such error having been made. The additional cost to the contractors amounted to $59.35."

This item speaks for itself. It was ordered by the Department itself direct. No question of its being required by a responsible officer can, therefore, be raised. It was allowed by the Court of Claims, and it is submitted that the allowance is correct.

Ramming and Sluicing Fillings.

The next item is stated in Finding X (pp. 43, 44), as follows:

"In refilling the dirt after the altars were in place no part of the filling was rammed or sluiced except the clay puddling. This was in accordance with the instructions of the engineer in charge of the work. The claimants discussed the matter with him, and he informed them that it was not required to be rammed or sluiced. He embraced the work done in that way in his monthly estimates, and the claimants received payment for a large portion of the work done in that way at the contract rate of 'Filling and grading per cubic yard, 30 cents.' In the latter part of August, 1894, however, there was a change in the office of engineer in charge of the work for the United States. The new engineer then placed in charge required the claimants to ram or sluice all back fillings. The claimants protested, insisting that the contract did not require anything more than depositing the material and evenly grading the surface to correspond with the grade of the station. The new engineer, however, required all the work to be thoroughly sluiced with water, and all but a small part thoroughly rammed, and the claimants did the work in that way under protest.

"The additional cost to the claimants of doing this work, over and above what would have been required had they not been required to ram or sluice the same, would be 10 cents a yard, making, for 37,227 yards, $3,722.70. The engineer who ordered the work to be done in the manner stated referred the question of so requiring it at the request of the claimants to the Chief of the Bureau of Yards and Docks, and the latter informed said engineer that the Department approved his requirement, for the reason, as shown by the Bureau, that the contract plainly required it."

This item was disallowed by the Court of Claims.

The action of the engineer first in charge was based upon the plain provision of the specifications, which, under the head of "Excavation and Grading," requires (p. 27):

"All earth excavated and not required for refilling or grading within the limits of structures is to be deposited within the limits of the station, at reasonable distances from the dock, where indicated by the commandant, not to exceed 1,000 feet from the dock, and brought up to the grade of the station as established."

The absence in this provision of any requirement as to ramming or sluicing is emphasized by the requirement under the head of "Puddling" (p. 31), which is as follows:

"Clay puddle, of the best quality to be obtained in the vicinity, shall be thoroughly rammed down behind the altars, following closely the securing of the latter, in the best manner, and extending to a depth of at least two feet from the lower side of the braces, measured at right angles to the slope. The different layers shall be thoroughly incorporated. It shall be free from all surface soil, sods, roots, and stones."

Why should clay puddle be expressly required by the specifications to be rammed down behind the altars and no such requirement be made in regard to other fillings? Under the rule *expressio unius exclusio alterius* the only legal construction of the specifications is that it required the ramming of clay puddle because that was regarded as necessary, and did not require the ramming of other fillings because it was supposed to be unnecessary. The specifications, it must be remembered, were prepared in the Navy Department (Finding II, p. 22), and the contractors had nothing to do but follow them under the explicit instructions of the engineer in charge.

The Court of Claims in *Simpson* v. *United States*, 31 C. Cls. 217, which was affirmed by this court 172 U. S. 372, said (p. 243):

"Further, the contract and specifications were drawn by the plaintiffs, and (following *Garrison* v. *The United States*, 7 Wallace, p. 690) 'its doubtful expressions should,

therefore, according to a well-known rule, be construed most strongly against the party who uses the language.'"

It would appear but just that the same rule should apply where, as in this case, the contract and specifications were drawn by the Government.

It would appear, too, that where for a long time the contract was construed by both parties as not requiring any such rammings, as was afterwards contended to be required by the contract, the case is a very strong one for the application of the rule of contemporaneous construction. Certainly after a large proportion of the work had been completed, as in this case, it should require a strong reason to induce the court to sanction any subsequent change of construction, where there is nothing in the specifications themselves warranting any such change.

The only ground which appears in the opinion of the Court of Claims for its failure to allow this item is (p. 52) "that the claimants should have submitted the requirements of the engineer in charge to the Chief of the Bureau before proceeding with the work. They were required to do so by the terms of the contract, and authority to compel them to do additional work was thereby reserved to the Chief of the Bureau."

But, in opposition to this ground, appears the express finding (p. 44), "The engineer who ordered the work to be done in the manner stated referred the question of so requiring it at the request of the claimants to the Chief of the Bureau of Yards and Docks and the latter informed said engineer that the Department approved his requirement, for the reason, as shown by the Bureau, that the contract plainly required it."

The allowance of this item is justified and required by the principles laid down in paragraphs numbered 1, 2 and 3 of the opinion of the Court of Claims in this case (Record, p. 49). It is submitted that it should be allowed.

Experiments with Water Jet by Order of Secretary of Navy.

This claim is set forth in Finding XI (pp. 44, 45) as follows:

"During the progress of this work it was discovered that the soil at the bottom of the dock was of a very tenacious and unyielding character, so as to be difficult of penetration for piles driven by the ordinary drop-hammer process, and was so reported by the contractors. On the 15th of February, 1894, it was stated that the round piles which were then being driven penetrated to a depth of from 8 to 10 feet. It was stated by the Bureau of Yards and Docks, on February 27, 1894, in answer to this statement, that while round piles penetrating from 8 to 10 feet, as now stated, may be satisfactory, depending upon the resistance shown by the first blow, yet the Bureau thought that these piles should be driven to a depth of 15 feet below the bottom of the excavation, if possible. A copy of this letter was furnished to the contractors, but when the report for piles driven in February was received it was found that the average of 76 piles driven on the 15th of February was 5 feet 0.77 inch, none going to 8 feet, and of the 57 piles driven on the 16th the average was 5 feet 0.60 inch, none going to 8 feet; and the average depth of the 891 piles driven in February was only 6 feet 0.82 inch. The general average for February was much reduced by the piles driven in the latter half of the month, after the attention of the contractors, as well as the civil engineer, had been called to the unsatisfactory depth reached by these piles. This report called forth from the Bureau other letters in March and April urging that the piles be driven to a greater depth and reiterating the instructions contained in the Bureau's letter of February 27. There was no claim made at this time by the contractors that they could not reach a greater depth than that hitherto reported. Thereupon the Bureau telegraphed definite instructions on the 13th of April to accept no piles driven to a less depth than 15 feet. The contractors made no attempt to show that they could not drive piles to that depth or to a greater

depth than had been obtained, but employed experts to give an opinion after tests upon the piles driven to show that the Bureau was wrong. In view of these facts, the Secretary of the Navy, on the 21st day of May, 1894, and upon the occasion of a visit to said dock by that official, verbally authorized and directed the contractors to sink the piles by a method known as the water-jet system; that is to say, by forcing water into the ground by means of a sink pipe operated by the hydraulic system, thus forming a hole into which the pile is set. The contractors objected to and protested against this method of driving the piles upon the ground that it destroyed and weakened the bottom of the pit, and subsequently a board of naval experts was convened for the purpose of reporting upon the advisability of sinking the piles by this system. The board reported adversely to this system, and recommended that the piles be driven in accordance with the provisions of the contract and by the ordinary drop-hammer process, the piles to be driven to a minimum of 6 feet. The remaining 696 piles, which were driven after this report by the drop-hammer process, reached an average depth of 10 feet 4 inches. The aforesaid board of naval experts, under the direction of the Secretary of the Navy, passed upon the expense to which the contractors had been put on account of this verbal order of the Secretary of the Navy to the contractors, requiring them to sink said piles by said water-jet system, and recommended an allowance to said contractors therefor in the sum of $1,156.76. The amount thus recommended by this board of engineers was approved by the Secretary of the Navy and a voucher therefor was drawn, but when the same came before the Auditor for the Navy Department for audit and before the Comptroller of the Treasury for payment, it was refused, upon the ground that the services required were not extra and additional, but that they were such as the contract contemplated, and upon the further ground that the Secretary of the Navy, under the specific requirements of section 7 of the original contract, had no power or authority to authorize or direct the incurring of this expense unless the cost of the same was first ascertained by a board of officers provided for that purpose before

the expense was incurred, and reduced to writing, as required by the seventh clause of the contract. Whereupon the Secretary of the Navy procured the reference of this item to this court under and pursuant to the provisions of Revised Statutes, section 1063.

"The reasonable value of the work set forth and described in this finding is $1,156.76."

This item was allowed by the Court of Claims.

According to the Comptroller of the Treasury, as quoted by the Secretary of the Treasury in his letter referring this item of claim to the Court of Claims (Record, p. 1):

"The principal questions at issue in this case are whether the Secretary had authority by oral direction to vary the terms of a written contract wherein was provided a formal method of varying such contract, and whether under the action taken by the Secretary, any claim arose in favor of claimants for extra compensation."

The question asked in the opinion of the Comptroller is answered by the judgment of the Court of Claims in *Ford* v. *United States*, 17 C. Cls. 60. The following paragraphs of the syllabus tersely summarize those parts of the decision material to this case:

"I. Courts can not transmute a contract into a statute of frauds, nor attach to the agreement of the parties the irrevocable, mandatory attributes of a statutory provision.

"II. A clause in a formal written contract providing that no claim shall be made for extra work unless first required and agreed upon in writing does not bind the parties. Such provisions were devised and inserted in building contracts to limit the power of architects and superintendents; but if the principals so act that the law will imply a contract for extra work, no prior agreement will render the transaction illegal or void.

"III. A provision in a written contract declaring that no claim for extra work shall be made unless it was required and agreed upon in writing is merely a condition, which may be waived by a subsequent oral agreement.

"IV. In applying the law of agency to the transactions of the government it has not been the purpose of the courts to curtail the lawful and reasonable powers of the executive."

This court went even further in *Clark* v. *United States*, 95 U. S. 539, and sustained a parol contract made by a mere subordinate with a party with whom the Government had no written contract whatever, after the contract had been executed and the Government had received the benefit of the services rendered or supplies furnished.

There could be no more direct authority for the performance of the work than that given by the Secretary of the Navy in person. A board of engineers afterwards recommended the allowance of one thousand one hundred and fifty-six dollars and seventy-six cents ($1,156.76) to the contractors, and the Secretary of the Navy approved the recommendation. Thus the strongest evidence was furnished of the authority for the work, and the view of the Navy Department that it was extra and additional to any requirement in the contract. The judgment of the Court of Claims allowed the same amount as did the board of engineers and the Secretary of the Navy.

The action of the Court of Claims in allowing this item should be affirmed.

Delay in Experimentation with Water Jet.

The facts in regard to this, the last item, are stated in Finding XII (p. 45), as follows:

"The delay incident to the experimentation with the water jet in driving piles, as stated in the last finding, extended from April 13, 1894, to July 5, 1894, a period of seventy days, exclusive of Sundays. The expense caused to the claimants by the defendants' officers in the suspension of the work was $2,625.

"The board named in the last finding reported in regard to the claim for these expenses as follows:

"'The board is of the opinion that the contractors are equitably entitled to a reasonable compensation for any additional expense incurred by them in the prosecution of the work in consequence of unusual delays that may be found to have been caused by the Government, but having no means of verifying the claim submitted for such additional compensation the board is unable to properly consider this question.'"

This item was allowed by the Court of Claims.

The principles upon which such an allowance should be based are those tersely stated by Chief Justice Waite in delivering the opinion of this court in *United States* v. *Smith*, 94 U. S. 214, 217, 218, as follows:

"In *Clark's Case*, 6 Wall. 546, it was decided that the United States were liable for damages resulting from an improper interference with the work of a contractor; and in *Smoot's Case*, 15 *id.* 47, that the principles which govern inquiries as to the conduct of individuals, in respect to their contracts, are equally applicable where the United States are a party. The same rules were applied in the case of the *Amoskeag Company*, 17 *id.* 592. Here the work was stopped by order of the United States. Smith asked to be released from his contract, unless he could go on. This was refused until the expiration of sixty days, when he was allowed to resume. As between individuals, certainly, this would be considered an improper interference, and damages would be awarded to the extent of the loss which was the necessary consequence of the suspension. The United States must answer according to the same rule. In this respect we can not consider this case different in principle from that of Clark, *supra*.

"The Court of Claims has found the amount of the damages to have been $5,000; that is to say, that sum, in its opinion, from the evidence before it, was necessary to place Smith in the same condition he would have been in if he had been allowed to proceed without interference, and not allowing anything for loss or injury to his materials, which he might have prevented by the exercise of reasonable care and prudence.

"This rule of damages, as an abstract proposition, is clearly right. Unless, therefore, there appears in the record some error growing out of the estimation of the amount, the judgment below should be affirmed."

Accordingly the judgment was affirmed.

This decision was followed in *United States* v. *Mueller*, 113 U. S. 153, where it was said (p. 156):

"The court was of opinion, that, as the delay was caused by a contemplated change of purpose in regard to the stone and the site, the enforced suspension and delay were unjustifiable, and not covered by the stipulations in the contracts that the stone and the work should be furnished as 'required.' 19 C. Cls. 591. We are of opinion that the court was correct in its view. *United States* v. *Smith*, 94 U. S. 214."

This item received the approval of the same board of engineers which approved the last one, but with the difference that the board fixed no amount, on which it expressed its inability to act in the absence of evidence. The finding of the Court of Claims shows the expense caused to be two thousand six hundred and twenty-five dollars ($2,625). The action of the Court of Claims in the allowance of this sum should be affirmed.

Conclusion.

In the argument of this case we have purposely pursued a line in some respects different from but in no degree conflicting with that adopted by the learned Chief Justice of the Court of Claims in delivering the opinion of the court (pp. 46–52). This has been done solely for the sake of avoiding repetition. We respectfully call the special attention of the court to that opinion as setting forth most ably and, we submit, conclusively, the principles which should govern the determination of this case.

The only complaint which these claimants, as appell-

ants in No. 128, have to make is that, as to two items rejected by the Court of Claims, the application of the very principles laid down by the court in its opinion appears to us to warrant and require their allowance.

It is asked that the judgment of the Court of Claims in favor of the claimants for twenty-four thousand nine hundred and forty-two dollars and ninety-nine cents ($24,942.99) be affirmed for the full amount of the award made to the claimants, and that an additional amount of four thousand four hundred and nineteen dollars and thirty-eight cents ($4,419.38) should be allowed for the two items of extra expense referred to.

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Attorney for Byron Barlow et al.
Appellees in No. 127;
Appellants in No. 128.

RUFUS H. THAYER,
Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, *Appellant*,
v.
BYRON BARLOW, JAMES E. BLACKWELL AND JAMES M. DOUGAN, Partners as BYRON BARLOW & CO. — No. 127.

BYRON BARLOW, JAMES E. BLACKWELL AND JAMES M. DOUGAN, Partners as BYRON BARLOW & CO., *Appellants*,
v.
THE UNITED STATES. — No. 128.

BRIEF IN REPLY FOR BYRON BARLOW & CO.

Appellees in No. 127;
Appellants in No. 128.

Tabulation of Amounts Involved.

The discussion of this case will perhaps be facilitated by the following tabulated statement showing the amounts involved in the several items of this case, and what disposition the court made of each:

Finding.		Allowed.	Rejected.
VII (p. 42). Stone quarried, cut and in part delivered	$5,494 45		
Difference between cost of stone actually furnished and what Tenino stone would have cost	15,607 43		
		$21,101 88	
VIII (pp. 42–43). Foundations for boilers and boiler-house			$696 68
XIX (p. 43). Concrete toe		59 35	
X (pp. 43–44). Ramming and sluicing fillings			3,722 70
XI (pp. 44–45). Experiments with water-jet		1,156 76	
XII (p. 45). Delay caused by said experiments		2,625 00	
Total		$24,942 99	$4,419 38
Total amount involved in both appeals			$29,362 37

The Issue.

The main contention of learned counsel for the United States in the able brief submitted by him is that the approval of the stone by the engineer in charge of the work on behalf of the United States, did not constitute a finality, but was subject to a reserved power on the part of the Chief of the Bureau of Yards and Docks of the Navy Department, to reject the stone even though so approved, subject only to the revisory power of the Secretary of the Navy.

It was suggested in our opening brief that the provision upon which the United States rely to defeat the approval of the local engineer, was probably not intended to determine the ultimate rights of the parties, but simply to afford a practical working rule under the contract.

It was further insisted in our opening brief that if intended to go further and prevent the contractors from resorting to their legal remedy in the Court of Claims, it is void as against the provision of the statute conferring

upon the Court of Claims jurisdiction of "All claims founded * * * upon any contract, expressed or implied, with the Government of the United States," Revised Statutes, § 1059; act of March 3, 1887, chapter 359, section 1, 24 Stat. at Large, 505.

Extent of Power of the Engineer.

The current of decision in this court has always been in maintenance of the validity of provisions in contracts designed to secure the judgment of an officer locally in charge of any work of public improvement, and thus enabled by his position on the ground to pass upon the work in a more expert manner and with more ready and intelligent knowledge than a court examining the subject at a remote distance, both of place and time from the transaction involved in the inquiry. For this reason neither party has brought up to this court any sample of the stone in question, nor was any direct finding made by the Court of Claims as to the quality of the stone here in controversy. All the facts which the court does find in regard to it, however, are calculated to lead to the belief that it was in every respect suitable for the purpose for which it was intended, and for which it had been accepted by the engineer in charge. (Finding IV, page 35, next to last paragraph.)

No such considerations apply in favor of the decision of an officer of the Government at a distance from the seat of work, who is no more competent to pass upon the facts than are the courts, and not nearly as competent to decide the questions of law.

As the court said of a provision for reference to arbitrators in *Hasbrouck* v. *City of Milwaukee*, 17 Wis. 266, 290, "Upon all matters arising under the contract which the engineer had power to decide, there could be no disagreement. His decision upon those subjects was absolutely

final and conclusive upon the parties. The contract so declared and provided."

Or, as tersely put by Willes, J. in *Pashby* v. *Mayor of Birmingham*, 18 Scott (Common Pleas), 2, 33: "It is clear that there could be no *res judicata* where there has been no *lis*.

See also *Mason* v. *Bridge*, 14 Maine, 468.

In previous cases, as in *Hawkins* v. *United States*, 96 U. S. 689, the submission of a question arising in the progress of the work to the responsible officer of the Government, has been deemed to be the very thing which fixed and determined the liability of the Government. Here, however, the contention is that the action of the head of the Navy Department, so far from fixing responsibility upon the Government for the work, was the very act which absolved the Government from all responsibility. The argument for the United States goes to the extent of maintaining that after the Secretary of the Navy had decided any or all questions, whether of fact or of law, arising under the contract, no suit would lie in the Court of Claims except in accordance with his award. Upon this ground, it is urged that the petition in this case should, in its entirety, be dismissed.

Well does the Court of Claims in its opinion say (p. 47):

"If the full intent and effect be given to this provision which the defendants now ascribe to it, the contractors might as well have written an agreement on half of a sheet of paper, binding themselves to perform whatever work and furnish whatever material the Chief of the Bureau might require, and accept therefor whatever remuneration the Secretary of the Treasury might be pleased to give them."

In *Nute* v. *Hamilton Mut. Ins. Co.*, 6 Gray (Mass.), 174. the difference between valid and void stipulations is pointed out as follows: The distinction is that conditions

precedent annexed to contracts, such as bringing the action within a certain time, practicing no fraud, making reasonable and true representations of loss, and the like, are merely modifications of the contract, but not the remedy, and are such as the parties may lawfully insert in contracts and insurance policies, but they can not import into such contracts stipulations in regard to the remedy itself, for that is something created and regulated by the law and not dependent upon the contract. The court, by Shaw, C. J., said that the rule was not founded on considerations of public policy alone, but "the greatest inconvenience would result in requiring courts and juries to apply different rules of law to different cases in the conduct of suits in matters relating mainly to the remedy according to the stipulations of parties in forming and diversifying their contracts in regard to remedies," and he enumerates certain stipulations which, if inserted in certain contracts, could not be relied on as a defense to a suit brought for the breach of such contract, viz.: "That in case of breach no action shall be brought; that the party in default shall be liable in equity only and not at law, or the reverse; that in any suit to be commenced no property shall be attached on mesne process, or seized on execution for the satisfaction of a judgment, or that the parties shall never be liable to arrest; that in any suit to be brought on such contract the party sued will confess judgment, or will waive a trial by jury, or consent that the report of an auditor appointed under the statute shall be final, and judgment be rendered upon it, or that the parties may be witnesses, or, as the law now stands, that the plaintiff will not offer himself as a witness; that when sued on the contract, the defendant will not plead the statute of limitations, or a discharge in insolvency," and the like.

The provision there held void was that an action on

the policy should be brought only in the county of Essex. It was held that it formed no bar to an action brought in the county of Suffolk.

In the present case it will hardly be contended that a provision in the following form would be valid: "It is hereby agreed that no suit or action shall be brought in the Court of Claims or any other tribunal against the United States under this contract." Yet, practically, this is what is claimed in the present case.

Smith *v.* Railroad, 36 N. H. 456.

The case of *Smith* v. *Railroad*, 36 N. H. 456, referred to by counsel for the United States (p. 23), clearly draws the distinction here insisted upon. After referring to cases where an impartial third person has been agreed upon as an arbitrator and his award given, and those, on the other hand, where one of the parties reserves the right of decision to himself, the court says (p. 491):

"Between the two classes of cases to which I have adverted, that of an agreement by way of condition precedent to refer matters in difference growing out of some contract, to the decision of indifferent third persons, and the attempt of a party interested in the same way to constitute himself judge in his own case, there is an intermediate class, where the contract requires that all disputes shall be referred, not to the party himself, but to his servant, agent, or employee."

After discussing the legal effect of decisions under such provisions, it concludes (p. 493):

"We think, therefore, it may well be doubted whether the measurement, appraisal, or other decision of a person so situated, that he can not, by any possibility, be regarded as indifferent or impartial, can justly be held to have in any degree the conclusive character of an award."

Ranger *v.* Great Western Railway, 5 H. L. Cas. 72.

The opinion in *Smith* v. *Railroad* proceeds to cite with approval the decision of the House of Lords in *Ranger* v. *Great Western Railway*, 5 House of Lords Cases, 72. Lord Chancellor Cranworth said, of a similar provision there considered (p. 89):

"Where it is stipulated that certain questions shall be decided by the engineer appointed by the company, this is, in fact, a stipulation that they shall be decided by the company."

And Lord Brougham said (p. 115):

"We have here the case, not of a Judge, nor indeed of anything like a Judge; the utmost that he can be said to be is a kind of referee to whom certain matters were, by the agreement of the parties, to be referred, I will not say for his arbitration, but rather for his report and decision."

Agreeably to this view, all measurements and computations made by the engineer were sustained. But the court took its own view of what was work under the contract and what was extra. The Lord Chancellor said:

"The masonry work, as to which this question arises, was either work included in what was to be done for the original contract sums, or it was extra work, to be paid for differently. I collect that it was chiefly of the latter description; but this matter, and the sufficiency of the amount certified, will form proper subjects for discussion in the inquiry which must now take place."

There is no indication of any intent to attribute absolute finality to the decision of the engineer, though the contract provided, in terms very similar to those of the one in this case, that the appellant (p. 75) "shall and will abide by, observe, perform, fulfill and keep, and in all

things obey, the decision in writing of the principal engineer for the time being."

Statutes Referring Questions to Heads of Departments.

There is a long line of decisions by this court holding that a statute referring a specific demand, or class of demands, to the decision of the head of a department or bureau is a purely administrative proceeding, settling no ultimate rights and not constituting a submission to arbitration in any proper sense of the term, even when the claimants appeared before the officer in question and consented to the submission and offered evidence.

DeGroot v. *United States*, 5 Wall. 419;
Gordon v. *United States*, 7 Wall. 188;
Chorpenning v. *United States*, 94 U. S. 397;
Nutt v. *United States*, 125 U. S. 650;
Smithmeyer v. *United States*, 147 U. S. 342;
Medbury v. *United States*, 173 U. S. 492.

If a specific grant by the law-making power itself of jurisdiction to decide on a controversy, or class of controversies, does not contain the element of arbitrament and award so as to make the decision a finality, much less can such finality attach to a decision made in a purely administrative capacity. The case at bar is an excellent instance of the justice of the remark made in one of these cases (*Gordon* v. *United States*, 7 Wall. 188, 195): "An arbitrament and award which concludes one party only is certainly an anomaly in the law."

Can the Courts Be Ousted of Their Jurisdiction?

Counsel for the United States does not hesitate to carry his argument to its logical conclusion. He says (p. 13), "It is submitted that the decision of the question by the Secretary of the Navy is final and conclusive upon the claimants as well as the Government; that it ousts the

jurisdiction of every court over the original cause of action; that no suit can be brought upon the contract," etc. But this conclusion is squarely opposed to the decision of this court in *Medbury* v. *United States*, 173 U. S. 492. It is laid down in that case in accordance with previous decisions therein referred to, that a reference even by statute of a given class of cases to the head of a department, does not prevent a party whose rights have been misconstrued by the executive officer, from coming into the Court of Claims and claiming what is due him, notwithstanding the misconstruction made by the Executive Department of the Government. This ruling is approved and followed in *Dooley* v. *United States*, 182 U. S. 222, where all the cases are reviewed. Surely a provision in a contract providing for a decision of a question by the head of a department, is not entitled to any more liberal construction than a similar provision in a statute. In neither case can the finality attributed to the decision of the executive officer, be regarded as extending beyond the confines of the Executive Department itself.

When the parties come into a court of law to have their rights determined, that determination must be made upon principles of law. It would be a needless proceeding to establish a court for the adjudication of claims against the United States, composed of judges learned in law, and with all the machinery to enable a court to sift and determine questions both of fact and of law, if, in the end, that court can do no more than register the conclusions of an executive officer who has already made a final determination of the rights of the parties.

Decisions Cited for the United States.

Most of the decisions cited by learned counsel for the United States go only to the extent to which those of

this court have gone;—that an engineer or other officer in charge of a specific work may properly be vested with power to pass upon certain specific questions of fact, which can better be settled on the spot than at some other place and time.

An author is indeed quoted (p. 25) as laying it down that even an idiot or lunatic may be made an arbitrator. But an author so enamored with the principle of arbitration as to go to this length may safely be left to class himself as an authority.

Jurisdiction of Courts Can Not be Ousted.

The view of this court of the extent to which stipulations of that kind, even when they go to the extent of being conditions precedent to a right of action may go, is illustrated by the case of *Hamilton* v. *Liverpool Insurance Co.* 136 U. S. 242, where the court said (p. 255):

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country."

Tested by this rule, no provision of a government contract can be sustained, which goes to the extent of substituting the decision of an executive officer upon the question of the ultimate liability of the Government on the contract, for that of tribunals appointed by law to hear and decide claims founded upon Government contracts, to wit, the Court of Claims, and ultimately upon appeal, this court.

Act Authorizing Construction of Dry Dock.

The act of March 2, 1891, 26 Stat. L. 804, cited by counsel for the United States, was indeed a sufficient authority for the Secretary of the Navy to make the contract in suit for the construction of the dry-dock. It

does not, however, either in terms or by any necessary implication, enlarge the general power of the Secretary of the Navy, and invest him with authority to act as arbitrator in any case in which the power to do so was not already vested in him by law.

Amount of Judgment on Stone Item Correct.

In addition to the objections made by counsel for the United States, to this entire item of the claim, it is further objected (p. 38) that the amount of the judgment is too large. Of course, it is not intended by counsel for the United States to challenge the correctness of the amount so far as that depends upon questions of fact. The finding of the Court of Claims is conclusive on that subject. The objection is, in substance, that the court allowed both of the items named (Finding VII, p. 42), as follows:

Tenino sandstone quarried, cut and delivered, 2,349 cu. ft. at 65 c. a cu. ft.	$1,526 85	
Tenino sandstone quarried and cut, but not transported, 7,280 cu. ft. at 65 c. a cu. ft., less the cost of transportation, 10½ c. a cu. ft., 54½ c. a cu. ft.	3,967 60	
Total for stone actually quarried and cut, and part of which was delivered		$5,494 45
Cost of Sucia Island and Dog-Fish Point Stone actually used in construction	33,556 23	
Less what it would have cost the claimants had they been permitted to furnish Tenino stone	17,948 80	
Difference		15,607 43
Total of two items		$21,101 88

The correctness of the allowance of $1,526.85 for Tenino sandstone actually quarried, cut and delivered, is perfectly clear. This stone was furnished and approved before any objection whatever was made to this particular sandstone (Finding IV, p. 37). Hardly less clear is the correctness of the allowance of $3,967.60 for the stone quarried and cut, though not transported to the site of work. This is expressly found to have been done "before receiving notice of the rejection of Tenino sandstone by the Bureau of Yards and Docks" (Finding VII, p. 42). These two items make up the $5,494.45 "for stone actually quarried and cut, and part of which was delivered," representing goods actually furnished. They constitute in effect a claim for goods sold and delivered, which would in a common law action be recoverable under the common counts. They are equally recoverable against the Government upon a *quantum valebant* under the authority of *Clark* v. *United States*, 95 U. S. 539, 542.

It would be an act of bad faith on the part of the Government to permit property to be furnished or services rendered upon the faith of an express contract, and with the approval of an officer clothed with full authority to accept them, and then to deny compensation for them upon the mere ground of a subsequent disapproval of the action of that officer by his official superiors.

This position is not in the least impugned by the finding made by the court, that the claimants have not paid the owners of the Tenino Stone Quarry for the stone, and that it does not appear that any action has been brought against the claimants by them. The owners of the quarry have no privity of relation with the Government; they are in no position to maintain a claim in their own names. Their rights must be worked out through the medium of the principal contractors with the Government, the present claimants. Whatever sum is recov-

ered in this action on this item will undoubtedly be subject to a claim on the part of the owners of the quarry against the claimants for the price of the stone.

The contract between the claimants and the Tenino Stone Company is in this record (p. 36), and binds the claimants to make payment for the stone only "as soon as payment is received therefor from the Government." It was not, therefore, at all necessary that the Tenino Stone Company should sue the present claimants in order to entitle the latter to maintain this action. They were perfecty warranted in awaiting the result of this suit, and then insisting upon these claimants paying them under their contract out of the recovery. *Hobbs* v. *McLean*, 117 U. S. 567.

The remaining item of $15,607.43 is not composed in any part of the items just discussed. That item represents the difference between what it would have cost the claimants to furnish Tenino sandstone and what it actually did cost them to furnish, deliver and cut the stone which actually went into the construction of the dry dock.

The validity of this item depends upon the question whether the engineer in charge of the work was the engineer designated by the contract to pass upon the quality of the stone. If he was so authorized, the whole amount of the judgment rendered by the Court of Claims for this stone is correct. If he was not so authorized, the claimants are in any event entitled to recover the $5,494.45 for the stone which was actually furnished.

Experiment With Water-Jet.

One of the items in dispute in this case was decided by the Secretary of the Navy favorably to the contractors, to wit: That stated in Finding XI, pp. 44, 45,

arising out of experimentation with the water jet and amounting to $1,156.76.

According to the theory of counsel for the United States, the decision of the Secretary of the Navy on this item would be a binding finality. Yet when he reaches that item in his brief, we find a marked abandonment of the theory that the decision of the Secretary of the Navy is conclusive, and a contention supported by elaborate argument that "The Secretary of the Navy had no more authority to waive the provisions of this contract than the humblest laborer employed upon the work" (p. 52).

In all other parts of his argument, it is insisted that the Secretary of the Navy had full power and authority to decide on every question arising under the contract. Here, however, the claim is that the Secretary of the Navy was entirely without authority to order the work in question, or to authorize payment for the same. On the other hand, counsel comes very near conceding, that, if the order had been given by the subordinate of the Secretary of the Navy, the Chief of the Bureau of Yards and Docks, there would have been a modification of the contract by an officer clothed with sufficient authority. This view, however, seems to reverse all principles of legal subordination. True, a local and even inferior officer may be vested with a certain limited authority to pass—and pass conclusively—upon questions of detail, involving the ascertainment of quality and the measurement of quantities of, the materials furnished. So, too, the Secretary of the Navy is not, and can not be, vested with authority to adjudicate the ultimate rights of contractors with his department. When it comes, however, to the making of a mere modification in a contract so as to order work not embraced therein, and to promise to pay for it, a wholly different question is presented.

The Secretary of the Navy is the highest executive authority of the Navy, short of the President; he has full supervisory power over the execution of work in the course of performance under contracts with his Department. Whatever right is vested in any officer of the Government to order extras in such work, is vested in the Secretary of the Navy. When he directed the contractors to experiment with the water jets, and promised to pay them an additional amount for these experiments, he waived the provisions of the contract which required any modification to be made in a particular way. This waiver he had the right to make. There was no statutory provision which stood in the way of a modification. What the Secretary of the Navy had agreed to originally, as to the mode in which the contract might be modified, he had the power to set aside afterwards, and to make the modification in a different way. It is nowhere claimed that he exceeded any general authority vested in him by the act authorizing the construction of this dry dock, or made a promise in excess of the appropriation. It is therefore unnecessary to discuss such cases as *Stansbury* v. *United States*, 8 Wall. 33, and *United States* v. *Garlinger*, 169 U. S. 316, which were cases of suits founded upon promises by heads of executive departments, made in violation of express provisions of statute law. No such case is presented by this record, which presents the simple element of a modification of a provision in a contract by the highest officer of the department with which the contract was made.

Delay in Experimenting.

What we have said under the heading of this item is in most of its parts applicable to the claim stated in Finding XII (p. 45), as to the delay incident to the experimentation with the water jet. The suspension of work caused

by this unsuccessful experiment into which the claimants were forced by the orders of the Secretary of the Navy was $2,625. The Board, which allowed the expense of the work itself, $1,156.76, as shown in Finding XI, failed to recommend an allowance for the expense of delay as shown in Finding XII, for the sole reason that it had no means of verifying the correctness of the amount claimed. The justice of the claim was admitted in principle. The amount of that expense has now been ascertained by the Court of Claims, and no reason is shown why it should not be allowed.

Cross-Appeal of the Claimants.

Our remarks on the items of the claim involved in the cross-appeal of the claimants, being that contained in Findings VIII and X (pp. 42–44), will be confined to a brief discussion of the two cases cited by counsel for the United States in opposition thereto. These cases are *Ferris* v. *United States*, 28 C. Cls. 332, and *Simpson* v. *United States*, 31 C. Cls. 217, the latter of which was affirmed by this court, 172 U. S. 372. In the former of these cases, the contractor imprudently relied upon the orders and representations of the officer in charge of the work and failed to bring the extra work ordered of him by the officer in charge to the attention of the responsible officers of the Government in the Department at Washington. For this reason the claimant failed to recover for any of the extra work which he had done.

In the present case no such objection can fairly be urged. In the case of Finding VIII (pp. 42, 43), it does not indeed appear that the claimants appealed to the Chief of the Bureau before doing the work, or that it was ordered by him. Subsequently, however, the matter was referred to him, and he decided that the work was required to be done by the terms of the contract. Thus it

is plain that the action of the engineer in charge was fully ratified by the Bureau at Washington, so that the question of work having been ordered by responsible officers can not arise.

As to Finding X (pp. 43, 44), the question is even plainer. Here it affirmatively appears by the sentence at the end of the finding (p. 44) that, at the request of the claimants, the engineer ordering the work referred the question of requiring it to the Chief of the Bureau of Yards and Docks, and that the requirement was approved by the Department upon the ground that the contract required it.

In *Pashby* v. *Mayor of Birmingham*, 18 Scott's Reports (C. P.), 2, the syllabus is as follows:

"By the contract it was further provided that if any dispute or difference should arise with the contractors in any way relating to the contract, or if any question should arise between any of the several contractors relating to the proposed building, such dispute, difference or question should be settled by the architect, whose decision thereon should be absolute and final. *Held*, that this condition applied only to disputes as to the mode of carrying on the several works, and not to differences between the contractors and the corporation as to their claim for extras."

Willes, J. said: "I am of the same opinion, as to the second question there is no dispute between the parties; it is clear that there could be no *res judicata* where there was no *lis*" (p. 33).

The case of *Simpson* v. *United States*, 172 U. S. 372, need only be referred to so far as to say that the decision was based in both courts upon the ground that the work performed was simply that required by the contract.

The claim was made that the site upon which the dry dock was built was of a different natural foundation from

what it was believed to be by both parties at the initiation of the work. It was held, however, that the agreement to build the dry dock was absolute, and that the fact that both parties believed the natural foundation of the work to be different could have no effect upon the plain terms of the contract. No such question arises in the present case.

GEORGE A. KING,
Attorney for Byron Barlow & Co.,
Appellees in No. 127;
Appellants in No. 128.

Office Supreme Court U. S.
FILED
MAR 13 1902
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, Appellant, v. BYRON BARLOW, JAMES E. BLACKWELL, and JAMES M. DOUGAN, partners as BYRON BARLOW & COMPANY.	No. 127.
BYRON BARLOW, JAMES E. BLACKWELL, and JAMES M. DOUGAN, partners as BYRON BARLOW & COMPANY, Appellants, v. THE UNITED STATES.	No. 128.

Motion for Modification of Judgment.

Now come Byron Barlow & Company, and move the court for a modification of the judgment rendered in these causes on the 24th day of February, 1902, so far as to include in the items to be allowed, that of three thousand nine hundred and sixty-seven dollars and sixty cents ($3,967.60) as the value of the stone actually quarried and cut for use in the dry-dock forming the subject of the contract out of which this claim arises, and in support of this motion, suggest the following ground:

That said stone was contracted for, quarried and cut, and the expense therefor incurred upon the faith of the statements, representations and assurances of the authorized engineer in charge of the work on said dry-dock, and

whose orders were upon any view of the case, binding upon the government, unless and until annulled, countermanded or revoked by his superiors in office, which was not done until after all such expense had been incurred and the work actually done, for which payment is sought by the item in question.

GEORGE A. KING,
Attorney for Appellees.

Brief in Support of Above Motion.

This motion is not an application for a rehearing of the entire cause on its merits. Nor does it even seek a modification of any of the principles announced in the opinion as the conclusions reached by a majority of the court. It simply asks the allowance of a single item — an allowance not inconsistent with, but (as seems to counsel) required by, the principles of the opinion rendered.

This is the item of Tenino sandstone, quarried and cut, but not transported, amounting to three thousand nine hundred and sixty-seven dollars and sixty cents ($3,967.60). The facts, as contained in Finding VII (Record, p. 42), quoted at page 6 of the opinion, are as follows:

"The claimants had also, before receiving notice of the rejection of the Tenino sandstone by the Bureau of Yards and Docks, caused to be quarried and cut, but not transported, 7,280 cubic feet, amounting, at 65 cents a foot, less the cost of transportation, 10½ cents a foot, 54½ cents a foot, to $3,967.60, making a total for stone actually quarried and cut, and part of which was delivered, of $5,494.45. That sum, however, has not been paid by the claimants to the owners of the said Tenino stone quarry, nor does it appear that any action or suit has ever been brought against the said claimants for said sum of money."

The stone in question was, it is true, not accepted as was the stone quarried, cut and delivered, amounting to one thousand five hundred and twenty-six dollars and eighty-five cents ($1,526.85), which is allowed by the judgment of this court. It was, however, prepared for delivery in accordance with the authority of the civil engineer in charge of the work, which authority was in any view valid until overruled by the Chief of the Bureau of Yards and Docks, or by the Secretary of the Navy, the engineer's superiors in office.

At the time the stone was prepared for delivery, not only had the authority of the engineer not been in any manner countermanded or set aside by his official superiors, but it had been in the strongest manner affirmed by letter of June 30, 1893, addressed by the Chief of the Bureau of Yards and Docks to the commandant of the Puget Sound Naval Station (Record, p. 39). The latter was thus instructed:

"In the further consideration of the matter the Bureau desires that it may be understood that it decides the contract and specifications to give *to the engineer the decision as to the standard of quality*, and he is fully authorized thereunder to fix upon the quality of sandstone he requires, by sample or otherwise, and require material equal to it."

The court below took the view that the decision of the engineer under the contract, bound the Government absolutely. This court holds that under other provisions of the contract, that decision was liable to be overruled by the Chief of the Bureau and Secretary of the Navy. Upon any view, the decision of the engineer was valid until overruled by his superior officers.

It is true (Opinion, p. 8), "The engineer was given power to judge, not a type of stone, but particular stones."

In this case, the engineer approved a sample of stone, and required the contractors to furnish material equal to it. Upon the faith of that approval and requirement, the contractors proceeded to incur heavy expense. Granting that the action of the engineer was not a finality, committing the government to the acceptance of any particular stones, it at least amounted to an authorized order under the contract, which order the claimants were not only justified in complying with, but which they were bound under time penalties (paragraph 9 of contract, Record, p. 19) to comply with promptly.

Two cases decided by this court, hold distinctly that where an order of this kind is given by an officer acting under a contract, and that order is afterwards revoked by the Government, all expenses incurred on the faith of the order prior to its revocation may be recovered by the contractor from the Government. These cases are *Bulkley* v. *United States*, 19 Wall. 27, and *Parish* v. *United States*, 100 U. S. 500. The latter case only will be here quoted, because it refers to the former. In that case a contract for ice provides (paragraph 2, 100 U. S. 501):

"That for each and every ton of ice delivered at Nashville, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty-five dollars ($25)."

All the ice delivered and accepted was paid for, just as all the stone delivered and accepted in this case has been paid for, or will be, by the judgment of this court already rendered. The claimants, however, claimed to recover the expense of securing a certain amount of ice ordered by a local officer whose order was afterwards revoked by the Bureau at Washington, whereupon the ice melted away on the hands of the contractors and became a total loss.

The court says (p. 504):

"The opinion of the Court of Claims found in the record bases the dismissal of the petition on the ground that the Assistant Surgeon-General, in making the order on claimants for the 30,000 tons of ice, was acting so wholly without authority, that Parish & Co. had no right to treat it as of any validity or as one which they were bound to regard. In the argument of the case before us, the counsel for Government abandons this view of the matter, and, we think, very properly. We apprehend if the case were reversed, and the United States were suing for damages incurred by a refusal of the contractors to conform to this order, the amount specified being needed and not forthcoming, there would be no question of the validity of the notice of the Assistant Surgeon-General."

Again (taking a view similar to that just announced in this case as to the paramount authority of the Chief of the Bureau), the court says (p. 505):

"It is not intended to deny that he was subordinate to the chief of his bureau; could be ordered to do or not to do particular things; and when an order made by him was disapproved, it might be revoked by that officer. But until so revoked or disapproved it was valid, and parties required to act under it had a right to rely on it."

Again (p. 507):

"*Bulkley* v. *United States* (19 Wall. 37) is an analogous case. Bulkley had contracted to do all the transportation of supplies from Fort Leavenworth to army posts further west which might be required of him by the government. He was notified that 1,700,000 pounds would be needed, and he made large preparations to meet this requirement. The United States did not need half this amount, and the freight was not delivered to him. He claimed the profits which he would have made by the terms of the contract if the freight had been delivered and carried. This court said he could not recover profits, but that, 'in making ready to meet the requirements of the notice, he was subjected to the loss of time, to trouble and expense. He is entitled to be paid accordingly.'

"We think the case before us comes within that principle. Claimants are entitled to the expenses and losses incident to the preparation to meet the demand of the notice served on them."

The claim in this case for the stone quarried and cut, but not delivered, rests upon precisely the same grounds as justified a recovery in the *Bulkley* and *Parish* cases.

The action of the engineer in the present instance, amounted, at the least, to a notice to the contractors that stone from the Tenino quarry would be considered by him, and would not be rejected for the sole reason that the quarry did not contain a stone suitable for the work. If, upon the strength of his statements, they incurred expense preparing such stone for delivery, it was a *bona fide* compliance on their part with an order of an officer whose authority was at all events good until countermanded. All the expense was incurred before it was thus countermanded. The finding is express that the stone was quarried and cut "before receiving notice of the rejection of the Tenino sandstone by the Bureau of Yards and Docks."

Nearly four thousand dollars worth of stone has been quarried and cut by these claimants or (what is the same thing) by their sub-contractors, on the faith of the action of an officer set over them by the Government, whose orders they were powerless to question. These orders were afterwards set aside, and, as this court has held, by competent authority. But all acts done by the contractors on the faith of those orders while they remained in force should be sustained, and all expenses incurred in reliance upon them should be reimbursed. This can only be done by an allowance for the stone quarried and cut before receiving notice of the revocation of the engineer's approval. The amount claimed represents only its actual value on the ground where cut. The claim-

ants were not bound to incur the useless expense of transportation to the site of the work when notified in advance that it would not be accepted, and the court below excludes cost of transportation as an element in its value (see the finding, quoted p. 6 of opinion of this court). The value of this stone will be wholly lost unless now allowed by judgment of this court.

It is of no importance that the price of the stone has not been paid by the claimants to the owners of the quarry. The owners of the quarry, if not the claimants, incurred the expense of quarrying and cutting it, and can only work out their rights through the intervention and in the name of the principal contractors. This circumstance was regarded as of no weight as regards the item of stone actually delivered and accepted, amounting to $1,526.85, already allowed by this court. It is equally without weight as regards the item now under discussion.

It is therefore asked that the sum of $3,967.60 be added to the $5,367.96 allowed by the judgment already rendered, making a total allowance of $9,335.56.

Respectfully submitted,

GEORGE A. KING,
Attorney for Appellees.

Supreme Court of the United States.

Nos. 127 & 128.—October Term, 1901.

127 The United States, Appellant,
vs.
Byron Barlow, James E. Blackwell, and James M. Dougan, Partners as Byron, Barlow & Co.

Byron Barlow, James E. Blackwell, and James M. Dougan, Partners as Byron, Barlow & Co., Appellants,
vs.
128 The United States.

Appeals from the Court of Claims.

[February 24, 1902.]

These are cross appeals. The appellees in No. 127, appellants in No. 128, filed three separate petitions against the United States in the Court of Claims for extra work done and extra materials furnished under a contract with the United States. The petitions were consolidated and tried as one case. On some of the claims the decision was in favor of of petitioners and on others in favor of the United States.

The claimants entered into a contract with the United States for the construction of a dry dock at Puget Sound, in the State of Washington. The contract was in writing, and was very full. There are only a few of its provisions in controversy, and those only need to be quoted:

"First. The constructors will . . . construct and complete, ready to receive vessels, a dry dock, to be located at the place shown on a plan accompanying this contract, at the naval station, Puget Sound, Washington; and will, at their own risk and expense, furnish and provide all labor, materials, tools, implements and appliances of every description—all of which shall be of the best kind and quality adapted for the work as described in the specifications—necessary or requisite in and about the construction of said dry dock and the caisson, pumping machinery, pump house, culverts, and all other accessories and appurtenances, in accordance with the aforesaid plans and specifications, subject to the approval of the civil engineer, or such other competent officer or person or persons as may for that purpose be designated by the party of the second part; it being further mutually stipulated and agreed that the officer or officers, person or persons, thus designated shall and may, from time to time during the progress of the work, inspect all material furnished and all work done under this contract, with full power to reject any material or work, in whole or in part, which he or they may deem unsuitable for the purpose or purposes intended, or not to strict conformity with spirit and intent of this contract and with the aforesaid plans and specifications, and to cause

any inferior or unsafe work to be taken down, by and at the expense of the contractors; and that all such rejected material shall be at once removed from the station and replaced by material satisfactory to such inspector, and that all such inferior or unsafe work shall be replaced by satisfactory work, by and at the expense of the contractors. Such inspectors shall at all times during the progress of the work have full access thereto, and the contractors shall furnish them with full facilities for the inspection and snperintendence of the same."

* * * * * *

"Seventh. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed and observed by the contractors, and all claims for extra compensation by reason of, or for or on account of, such extra performance, are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect, except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change or modification in the aforesaid plans and specifications, such change or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof which the contractors shall receive, if any: Provided, That whenever the said changes increase or decrease the cost by a sum exceeding five hundred dollars ($500) the actual cost thereof shall be determined by a board of naval officers appointed for the purpose, and the contractors shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation they shall be entitled to receive in consequence of such change or changes: And provided also, That no further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part: And provided further, That no change herein provided for shall in any manner affect the validity of this contract.

"Eight.h The aforesaid dry dock and its accessories and the appurtenances and each and every part thereof, shall be constructed of approved materials and in a thoroughly substantial and workmanlike manner, in accordance with the true intent, meaning and spirit of the contract, plans and specifications, to the satisfaction of the party of the second part.

* * * * * *

"Fourteenth. It is expressly understood, covenanted and agreed by and between the parties to the contract, that if any doubts or disputes as

to the meaning or requirements of any thing in the contract, or if any discrepancy appear between the aforesaid plans and specifications and this contract, the matter shall be at once referred for the consideration and decision of the Chief of the Bureau of Yards and Docks, and his decision thereon shall be final, subject, however, to the right of the contractors to appeal from such decision to the Secretary of the Navy, who, in case of such appeal, shall be furnished by the contractors with a full and complete statement of the grounds of their appeal, in writing, and shall thereupon take such action in the premises as, in his judgment, the rights and interests of the respective parties to this contract shall require, and the parties of the first part hereby bind themselves and their heirs and assigns, and their personal and legal representatives, to abide by his, the said Secretary's, decision in the premises."

The specifications referred to in the contract contain the following provision:

"The ashlar must be of granite or sandstone, of quality approved by the engineer. All stones must be hard, clean and free from seams and imperfections, and of good bed and build. They must be laid true on their natural beds, and without pinning."

The largest item in the contentions of the parties arises on that provision of the specifications.

The court found that a bid based on the use of sandstone was accepted, and that shortly after the inception of the work the claimants tendered to U. S. G. White, civil engineer in charge of the work, a sample of the sandstone which was proposed to be used in the ashlar of the dock, and offered at the same time to exhibit to him the quarry from which the stone was taken. Early in the spring of 1893 the engineer visited the quarry, satisfied himself by certain inspections (which are detailed in the findings) of the quality of the stone, observed its satisfactory use elsewhere, and made numerous examinations with a glass magnifying six or eight diameters, looking to the detection of any mica or other substances in its composition, and found none, the texture appearing uniform and good under the glass, and he subsequently made a test to determine the percentage of absorption. As the result of this examination he approved the sandstone from the Tenino quarry, and informed the claimants that the same would be accepted for all work under the contract.

On May 4, 1893, the claimants (appellees), relying on the assurance of the engineer, entered into a contract "with the owners of the quarry to furnish them from said quarry all of the sandstone required for the work." By the contract (which is set out in full in the findings) the Tenino Stone Quarry Company covenanted to furnish and deliver "all of the sandstone required for the stone entrance of the United States dry dock, Puget Sound, Washington, according to drawings and schedules of courses, numbers and sizes furnished by the parties of the second part, and which form a part of this contract, for the sum of forty (40) cents per cubic

foot, and all of the stone for the boiler and pump house trimmings for the sum of fifty-five (55) cents per cubic foot." And it was covenanted "that the stone shall be Tenino bluestone of good, even, regular texture, of quality approved and acceptable to the civil engineer, United States Navy, in charge of construction." Also that "payments of 90 per cent to be made monthly for all stone delivered the previous month upon acceptance, approval and estimate of the civil engineer, United States Navy, in charge of construction, and as soon as payment is received therefor from the Government by the parties of the second part, and the remaining ten per cent upon completion of the setting of the stonework and upon the approval and acceptance of the stone by the said civil engineer, United States Navy."

Afterwards the claimants entered into a contract with Albert and Lewis Beaudette, stonecutters, to cut the stone. Subsequently 2,377 cubic feet of stone arrived at the site of the dock, which amounted to $1,545.05 at 65 cents per foot, and was included in the vouchers rendered by claimants in the month of June, 1893, to which the following certificates, signed by the engineer officially, were annexed:

"Having fully examined the labor and materials above charged, I certify that they are of good quality and in all respects in conformity with the written contract of date October 29, 1892."

"Received the above labor and materials in good order at Puget Sound Naval Station this first day of July, 1893."

The amount rendered by the claimants, which included the said sum $1,545.05, was approved by the Commandant, John C. Morong, July 8, 1893. The Navy Department struck out the item for $1,545.05 on account of a communication from the Tacoma Trades Council of the State of Washington, complaining of the quality of the stone. A report on the quality of the stone was called for from the Commandant, and the latter in turn called for a report from the engineer in charge. The engineer reported favorably on the quality of the stone, and attached to his report letters from the chief engineer of the Northern Pacific Railroad and others. The Commandant accepted the report as his own, and forwarded it to the Navy Department.

June 14, 1893, the claimants addressed a letter to the Department describing the qualities of the stone, and stated the protest against it was prompted by a "spirit of boycotting."

On the 21st of August, 1893, the claimants sent a letter to the engineer in charge, including their bill for the sandstone, and reciting the circumstances which led to its selection, and insisted "on immediate payment for said stone and the Bureau's decision as to the remaining stone."

On the 31st day of August, 1893, the Chief of the Bureau of Yards and Docks announced by letter to the Commandant of the Puget Sound

Naval Station that the Tenino stone would not be accepted as material for construction, and on the 8th of September, 1893, the engineer in charge notified the claimants of this decision.

Upon being informed of this decision the claimants protested against the requirement, but offered stone from Sucia Island, and also from Dog Fish Point, which was accepted and used in the construction of the dock.

Upon their tendering such stone to the civil engineer in charge, he wrote them under date of March 29, 1894:

"Messrs. Byron Barlow & Co.,
Charleston, Washington,

"Gentlemen: The receipt of your favor of yesterday is acknowledged, and in reply would say that the stones referred to therein, having been approved by the Bureau, will be accepted by me, subject to inspection under such specifications as I may be furnished with by the Bureau.

"2. The specifications forming a part of your contract being of no effect under existing circumstances, I have asked for such specifications as will doubtless be furnished therewith before any stone will be delivered here.

"Very respectfully, U. S. G. WHITE,
Civil Engineer, U. S. Navy, in Charge of Construction."

Upon receiving the communication in regard to the quality of the Tenino stone the Navy Department, through the Bureau of Yards and Docks, instituted an examination into the qualities of the stone and its fitness, "with the result that said Navy Department, through the Chief of the Bureau of Yards and Docks, reached the conclusion that said Tenino sandstone was not fit and suitable for the purposes to which it was proposed to use said stone; that said stone did not fulfil the requirements of the contract and specifications as above recited; that it was not a hard stone, nor a clean stone, nor free from imperfections; that its absorbent qualities were too high; that its crushing strength was too low, and that it was in many essential particulars totally unfit and unsuitable and undesirable for the use in the ashlar of this dry dock; and thereupon, to wit, on the 29th day of August, 1894, the contractors were notified of this decision of the Bureau of Yards and Docks, and were required to furnish other and better sandstone. From this decision of the Chief of the Bureau of Yards and Docks the claimants appealed to the Secretary of the Navy, who concurred in the opinion of the said Chief of the Bureau of Yards and Docks, and concurred in his order requiring a different and better sandstone. The tests and analyses of said Tenino sandstone were made from samples furnished to the Bureau of Yards and Docks by the contractors and by the Commandant of the Puget Sound station. The delay in arriving at the ultimate determination to require a better quality of sandstone, which was reached on the 24th of August, 1894, was partly caused by the fact that the claimants were in correspondence with the Sec-

retary of the Navy in an endeavor to persuade him to accept said Tenino sandstone. The tests and analyses of said stone, as above recited, were made promptly."

And it was found by the court:

"The amount of Tenino sandstone quarried, cut and delivered was 2,349 cubic feet, amounting, at 65 cents a cubic foot, to $1,526.85.

"The claimants had also, before receiving notice of the rejection of the Tenino sandstone by the Bureau of Yards and Docks, caused to be quarried and cut, but not transported, 7,280 cubic feet, amounting, at 65 cents a foot, less the cost of transportation, 10½ cents a foot, 54½ cents a foot, to $3,967.60, making a total for stone actually quarried and cut, and part of which was delivered, of $5,494.45. That sum, however, has not been paid by the claimants to the owners of the said Tenino stone quarry, nor does it appear that any action or suit has ever been brought against the said claimants for said sum of money.

"The total amount expended by the claimants for furnishing, delivering and cutting the stone which actually went into the construction of said dry dock from Sucia Island and Dog Fish Point, as aforesaid, was $33,556.23.

"If they had been allowed to furnish Tenino stone they could have done so at a cost of $17,948.80. The additional cost, therefore, to the claimants of furnishing the stone which they did furnish, over and above what it would have cost them to furnish the Tenino stone, is the difference between the two sums last named, amounting to $15,607.43."

In the execution of the contract claimants made a mistake in the cutting off of certain piling, which mistake could be corrected in two ways. One of the ways was accepted by the Navy Department and executed by the claimants as required, but claimants were also required to make some additions which "had no relation to the error which had been made in the original construction of the sheet piling, but would have been required irrespectively of any such error having been made. The additional cost to the contractors amounted to $59.30." (Finding IX.)

It was discovered during the progress of the work that the soil at the bottom of the dock was of a very tenacious and unyielding character, so as to be difficult of penetration for piles driven by the ordinary drop-hammer process, and was so reported by the contractors.

It was stated, on the 15th of February, 1894, that penetration was from 8 to 10 feet, and while the Bureau of Yards and Docks thought this might be satisfactory, yet the Bureau also thought that the piles should be driven, if possible, fifteen feet below the bottom of the excavation. There was no claim made by the contractors at that time that they could not reach a greater depth than theretofore reported. After some correspondence the Bureau telegraphed definite instructions to accept no piles driven to a less depth than fifteen feet. The contractors made no attempt to show that this could not be done, but employed experts to give an opinion, after tests upon the piles driven, that the Bureau was wrong. "In

view of these facts, the Secretary of the Navy, on the 21st day of May, 1894, and upon the occasion of a visit to said dock by that official, verbally authorized and directed the contractors to sink the piles by a method known as the water-jet system; that is to say, by forcing water into the ground by means of a sink pipe operated by the hydraulic system, thus forming a hole into which the pile is set. The contractors objected to and protested against this method of driving the piles upon the ground that it destroyed and weakened the bottom of the pit, and subsequently a board of naval experts was convened for the purpose of reporting upon the advisability of sinking the piles by this system. The board reported adversely to this system, and recommended that the piles be driven in accordance with the provisions of the contract and by the ordinary drop-hammer process, the piles to be driven to a minimum of 6 feet. The remaining 696 piles, which were driven after this report by the drop-hammer process, reached an average depth of 10 feet 4 inches."

The same board of naval experts, under the direction of the Secretary of the Navy, passed upon the expense caused the contractors by the use of the water-jet system, and recommended an allowance of $1,156.76. The allowance was approved by the Secretary and a voucher drawn therefor; "but when the same came before the Auditor for the Navy Department for audit and before the Comptroller of the Treasury for payment, it was refused, upon the ground that the services required were not extra and additional, but that they were such as the contract contemplated, and upon the further ground that the Secretary of the Navy, under the specific requirements of section 7 of the original contract, had no power or authority to authorize or direct the incurring of this expense unless the cost of the same was first ascertained by a board of officers provided for that purpose before the expense was incurred, and reduced to writing, as required by the seventh clause of the contract. Whereupon the Secretary of the Navy procured the reference of this item to this court under and pursuant to the provisions of Revised Statutes, section 1063." (Finding XI.)

The reasonable value of the work set forth and described in the finding is $1,156.76.

The foregoing statement of facts is applicable to the appeal of the United States. The findings applicable to the appeal of claimants (No. 128) are given in the opinion.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the Court.

The principal claim of appellees and the largest item in the judgment awarded them grows out of the rejection of the Tenino sandstone. That item was based upon the provision in the specifications which required it to be "of quality approved by the engineer." But that provision, it is

contended by the United States, must be read and construed with those covenants of the contract which require (1) that all materials used in the dry dock shall be of the best kind, "subject to the approval of the civil engineer, or such other competent officer or person or persons as may for that purpose be designated by the party of the second part," which officer or persons may, "from time to time during the progress of the work, inspect all material furnished, . . . with full power to reject any material, in whole or in part, which he or they may deem unsuitable for the purpose or purposes intended, or not in strict conformity with the spirit and intention of this contract, and the aforesaid plan and specifications." And the United States also relies upon the covenants contained in the fourteenth subdivision of the contract set out in the statement of facts.

And we think these provisions are harmonious and determine the rights of the parties. We think, indeed, that the engineer in charge of the work was the appointee of the parties, and that his decision upon the quality of sandstone was final when properly exercised, but it could not be exercised in advance of the work and forestall his judgment of stone furnished or about to be used, or the judgment of any "other competent officer or person or persons" who might be designated by the Navy Department. To so hold would destroy the power reserved by the United States to appoint any competent person to inspect the work and material. The engineer was given power to judge, not a type of stone, but particular stones. It was such stones which were to be "hard, clean and free from seams and imperfections, and of good bed and build." Such was the power of the engineer in charge, but who should be the "engineer in charge" depended upon the appointment of the Navy Department; and and the power of appointment was reserved to be exercised at any time. A useless right if one appointee could anticipate and control the judgment of his successor.

The influence which these considerations have in the interpretation of the contract is not destroyed by answering that every stone from the Tenino quarry might have satisfied every requirement and have been approved by every and any person designated to inspect the work. This, indeed, might be so; but, on the other hand, not one stone might have passed the test. Besides, claimants are not in a position to urge that consideration. Every stone which might be tendered for inspection was subject to be rejected, but claimants seek to recover as for an acceptance. They rely not upon approval of stones, but upon the approval of the quarry, and they rest the quality of the quarry upon the general inspection of the engineer and certain instances of satisfactory use. In opposition stands the covenants of the contract already mentioned, and the test the Bureau of Yards and Docks made of samples of Tenino stone furnished by claimants. And

there is no pretense that the test was unfairly made. It, at least, convinced the Bureau that the Tenino stone was not a hard stone, nor a clean stone, nor free from imperfections.

The Court of Claims did not pass upon the issue raised as to the quality of the stone. It accepted the decision of the engineer as being final as a matter of law. We cannot concur to the full extent of the decision, and must limit, therefore, the recovery of claimants to the price of stone inspected and approved. On this the finding is that "the amount of Tenino sandstone quarried, cut and delivered was 2,349 cubic feet, amounting, at 65 cents a cubic foot, to $1,526.85."

These views render it unnecessary to consider that provision of the contract which makes the decision of the Chief of the Bureau of Yards and Docks final, only subject to appeal to the Secretary of the Navy, of "any doubts or disputes as to the meaning or requirement of anything" in the contract.

2. The next item of importance is the expense to which the claimants were subjected in experimenting with the water-jet system. The court found that the experiment was ordered by the Secretary of the Navy against the protest of the claimants, and the board of inspectors found that the cost of the experiment to the claimants was $1,156.76, and recommended the payment of that sum. This action was approved by the Secretary, and vouchers drawn accordingly. It was refused when it came for audit and payment, because "under the specific requirements of section 7 of the original contract, [he] had no power or authority to authorize or direct the incurring of this expense unless the cost of the same was first ascertained by a board of officers provided for that purpose before the expense was incurred, and reduced to writing, as required by the seventh clause of the contract. Whereupon the Secretary of the Navy procured the reference of this item to this court under and pursuant to the provisions of Revised Statutes, section 1063."

There was certainly nothing in the contract or in the specifications which required the contractors to experiment with the water-jet system. There was nothing in the contract which required them to experiment with ineffectual or detrimental methods. Their obligation was to drive the piles in the construction of the dock to a sufficient depth, and it is not found that the depth attained, when the Secretary of the Navy interferred, was not sufficient. The Bureau of Yards and Docks conceived a greater depth to be necessary and that it could be attained. Some controversy arose, and there were reports to and correspondence with the Bureau of Yards and Docks, and finally the Bureau "telegraphed definite instructions" "to accept no piles driven to a less depth than 15 feet." In view of the facts the Secretary of the Navy, on the occasion of a visit to the dock, "verbally authorized and directed the contractors to sink the

piles" by the water-jet system. The contractors protested and predicted failure. Failure occurred and the system was abandoned upon an adverse opinion of its utility given by a board of naval experts.

It is contended by the United States that the direction of the Secretary of the Navy was a change or modification of the contract within the meaning of the seventh subdivision of the contract, and that the Secretary had no power to direct or consent to such change more than the "humblest laborer employed upon the work," and besides, that no such change could be made except by an agreement in writing.

We have no doubt of the power of the Secretary of the Navy, His power is manifest from the contract and is given by law. The duties of the bureaus of the Navy Department are performed under the control of the Secretary of the Navy. Their orders are considered as emanating from him and have "full force and effect as such." (Section 420, R. S.) And the act of 1891, which provided for the construction of the dry dock, authorized the Secretary of the Navy to have it constructed by contract. He especially stood for the United States in such contract, and was invested with its power, and was charged with the duty of seeing that the dock was adequately constructed.

It is further contended by the government that the experiment with the water jet system was a "change or modification" of the contract, and because not agreed to in writing by the parties that the expense incurred by the contractors in making the experiment cannot be recovered.

If both contracting parties were individuals, it would easily be seen that subdivision seven was inserted in the contract for their benefit, to be insisted upon or waived as to them might seem best. What precluded that freedom and useful power to the government? If not precluded it certainly could have been exercised, and, as we have seen, through the Secretary of the Navy. If the power to insert the provision in the contract or to omit it was given, the power to dispense with it was also given, unless it was necessary to be inserted, and could not be dispensed with, on account of some injunction of the law. Such injunction, as we understand counsel, is claimed by virtue of section 3744 of the Revised Statutes, which requires the Secretary of the Navy to cause all contracts made by his department to be reduced to writing and signed by the contracting parties with their names at the end thereof. It is certainly disputable if the requirement of the section applies to alterations, which may become necessary in the progress of work regularly conducted under contract. And this court has held that the requirements of the section did not preclude a recovery for property or services "as upon an implied contract for a *quantum meruit*." (*Clark* v. *United States*, 95 U. S. 539.) But we are not required to decide on this record the question suggested. We do not think that the order of the Secretary of the Navy directing the

experiment with the water jet system was a "change or modification" of the contract within the sense of subdivision seven. It was an exercise of superintendence and unwarrantable superintendence. The experiment was forced upon the contractors. They were powerless to do anything but protest and yield. The interference with the work of driving the piles by the drop-hammer process was an improper interference, and brings the claim of the contractors within the rule in *Clark's* case, (6 Wall. 546;) *Smoot's* case, (15 Id. 47;) the case of the *Amoskeag Company*, and within the ruling of *United States* v. *Smith*, (94 U. S. 214,) where the other cases are cited and approved. By denominating the order of the Secretary as an improper interference, we mean in a legal sense. The facts show that he considered the order as a proper exercise of his authority, and beneficial to the United States. Nor did he intend to be oppressive to the contractors. He subsequently recognized their right to reimbursement for the expenses which they had incurred.

The measure of damages adopted by the Court of Claims, we think, was correct. The expense caused to the claimants by the suspension of the regular work was as definite and as directly assignable to the action of the Secretary as the expenditure in the experiment.

There was no error in allowing the sum of $59.30 for the extra work set forth in Finding IX.

The summary of our views upon the appeal of the United States is that the Court of Claims erred in allowing the following claims:

Tenino stone quarried and not delivered	$3,967 60
Difference in cost between Tenino stone and that which was furnished	15,607 43
	$19,575 03

The appeal of the claimants is based on the action of the Court of Claims in denying recovery for the extra work and materials described in Findings VIII and X.

Those findings are as follows:

"VIII. The plans for the foundations of the boilers and boiler house were submitted to the civil engineer in charge of the work and approved by him, and the work was then done on said foundations in accordance with the directions of said engineer. The foundation for the boiler house were completed and accepted by said engineer and included in his monthly estimate and paid for. The foundations for the boilers were made in accordance with the drawings so submitted to said engineer, and were completely laid at about the time the engineer first in charge of said work was detached therefrom. Subsequently another engineer was placed in charge of the work. In his opinion the foundations were imperfect and insecure because of defective construction on the part of the claimants, and he required that they be relaid. The claimants, protesting that it was not competent to require them to change the foundations after they

had laid the same to the acceptance of the engineer in charge at the time of the original construction, relaid the same in accordance with the direction of the engineer thus subsequently in charge. The matter was subsequently referred to the Chief of the Bureau of Yards and Docks, and he decided that the work was required to be done by the terms of the contract. It does not appear that the claimants appealed to the Chief of the Bureau before doing the work, or that it was ordered by him.

"The total additional cost of said work to the claimants was—

For the extra foundations for the boiler house.....	$312 12
And for the extra foundations for the boilers.....	384 56
Making a total of.....	$696 68"

"X. In refilling the dirt after the altars were in place no part of the filling was rammed or sluiced except the clay puddling. This was in accordance with the instructions of the engineer in charge of the work. The claimants discussed the matter with him, and he informed them that it was not required to be rammed or sluiced. He embraced the work done in that way in his monthly estimates, and the claimants received payment for a large portion of the work done in that way at the contract rate of 'Filling and grading per cubic yard, 30 cents.' In the latter part of August, 1894, however, there was a change in the office of engineer in charge of the work for the United States. The new engineer then placed in charge required the claimants to ram or sluice all back fillings. The claimants protested, insisting that the contract did not require anything more than depositing the material and evenly grading the surface to correspond with the grade of the station. The new engineer, however, required all the work to be thoroughly sluiced with water, and all but a small part thoroughly rammed, and the claimants did the work in that way under protest.

"The additional cost to the claimants of doing this work, over and above what would have been required had they not been required to ram or sluice the same, would be ten cents a yard, making, for 37,227 yards, $3,722.70. The engineer who ordered the work done in the manner stated referred the question of so requiring it, at the request of the claimants, to the Chief of the Bureau of Yards and Docks, and the latter informed said engineer that the Department approved his requirement, for the reason, as shown by the Bureau, that the contract plainly required it."

The claims were rightly disallowed. Some of the observations already made apply to them. The contract is very explicit in that all labor and materials "shall be of the best kind and quality adapted for the work," and subject not only to the approval of the civil engineer at a particular time, but subject to the approval of any engineer subsequently appointed, "with full power to reject any material or work, in whole or in part, which he or they (some other competent officer or person or persons) may deem unsuitable for the purpose or purposes intended. . . . And to cause any inferior or unsafe work to be taken down by, and at the expense of the contractors, . . . and replaced by material satisfactory to such inspector . . . by and at the expense of the contractors."

In addition to these views we quote from the opinion of the Court of Claims as follows:

"As to the causes of action set forth in Findings VIII and X, the court is of the opinion that the claimants should have submitted the requirements of the engineer in charge to the Chief of the Bureau before proceeding with the work. They were required to do so by the terms of the contract, and authority to compel them to do additional work was thereby reserved to the Chief of the Bureau."

Judgment is reduced to the sum of $5,367.96, and for that amount

Affirmed.

Mr. Justice BREWER and Mr. Justice PECKHAM dissented.

Justice HARLAN did not hear the argument, and took no part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.